(20,936.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 533.

CHARLES THOMAS, PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 4, 1908.

1

No. 24375.

STATE OF IOWA
v.
CHARLES THOMAS, Appellant.

Docketed on Transcript of Judgement, July 24th, 1905.

Papers Filed by Appellant.

September 16th, 1905. Motion to continue.
December 13th, 1905. Extension of time to file abstract.
December 13th, 1905. Abstract.
January 6th, 1906. Argument.
May 14th, 1906. Resistance to motion to continue.
December 19th, 1906. Notice of rehearing.
December 31st, 1906. Motion to tax costs.
January 19th, 1907. Petition for rehearing.

Papers Filed by Appellee.

July 24th, 1905. Transcript of judgment.
May 12th, 1906. Motion to continue.
May 15th, 1906. Reply on motion.
May 15th, 1906. Amended motion to continue.
May 15th, 1906. Additional abstract.
September 8th, 1906. Argument.
January 5th, 1907. Resistance to motion to tax costs.

2

Polk D. C.

No. 24375.

STATE OF IOWA
v.
CHARLES THOMAS, App'l't.

Supreme Court Record No. 26, Page 184.

Continued by agreement of counsel.

Record 26, Page 379.

Continued by agreement of counsel.

Record 26, Page 506.

Case continued.

Record 26, Page 535.

Appellant's motion to set aside the entry of continuance heretofore made is ordered sustained, and the same is hereby vacated and set aside.

Record 26, Page 540.

Appellee's motion to continue, having been considered, is sustained.

Record 27, Page 106.

Case submitted on abstracts and arguments on file, and oral arguments by counsel for respective parties.

Record 27, Page 209.

Motion to tax costs in this case, having been considered, is overruled.

Record 27, Page 400.

By agreement of attorneys this case is passed to the second period present term.

Record 27, Page 420.

Continued by agreement of counsel.

3 Record 27, Page 559.

Submitted on the Petition for Rehearing on file, and oral arguments of counsel.

Record 27, Page 573.

This day, petition for rehearing filed herein having been fully considered by the Court is overruled.

Opinion.

Record No. 3, Page 92.

No. 24375.

STATE OF IOWA
v.
CHARLES THOMAS, App'l'nt.

Appeal from Polk District Court.

In this cause, the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court. It is therefore considered by the Court that the judgment of the Court below be and it is hereby affirmed and that a writ of *procedendo* issue accordingly.

It is further considered by the Court that the app'l'nt pay the costs of this appeal, taxed at $195.05 and that execution issue therefor.

4 In the Supreme Court of Iowa.

Filed Nov. 21st, 1906.

STATE OF IOWA
vs.
CHARLES THOMAS, Appellant.

Appeal from Polk District Court—Hon. A. H. McVey, Judge.

Defendant was convicted of murder in the first degree committed by the administration of poison to one Mabel Scofield, resulting in her death, and sentenced to imprisonment in the penitentiary for life, and from this sentence he appeals.

McHenry, Mulvaney & Jones, for Appellant.
Charles W. Mullan, Attorney General, Lawrence De Graff, Assistant Attorney General, and Jesse A. Miller, County Attorney for the State.

McCLAIN, *C. J.:*

On the 22nd day of October, 1899, the body of Mabel Scofield was found in the Des Moines River, and in December, 1904, the grand jury of Polk County indicted defendant for the murder of Mabel Scofield, by the administration of poison. The evidence tended to show that Mabel Scofield and Maggie Hammond had come to Des Moines six or seven weeks before Mabel Scofield's death, and had gone to live with the parents of the defendant, to whom Maggie Hammond was related, and that the girls were employed in a dressmaking establishment. On the morning of October 21, 1899, which was Saturday, Mabel Scofield had accompanied her mother,
5 with whom she had just previously returned from a short trip to Waterloo, to the train, on which her mother was to return to her home. After her mother's departure from the Union Station on the train, Mabel Scofield started up West Fifth Street at the east end of the station. Where she subsequently went and what occurred to her between this time and three o'clock of the afternoon of the next day when her body was found in the river is the subject of controversy among the witnesses whose testimony is set out in this record. It does not appear that she went to her place of work, which was on West Sixth Street, and which she could have reached in a very direct way by going up Sixth Street from the west end of the station, nor that she was at her place of work during the day. Witnesses for the prosecution testify that she was seen returning to the Thomas home on Woodland Avenue near West Tenth Street, and that she was seen at the Thomas home within a short time after she left the Union Station. There is no evidence that she was seen about the Thomas home after that, and the theory of the prosecution

is that she died not later than half past ten o'clock from the effect of chloral hydrate of chloroform, or the two poisons combined, administered to her by defendant after her return to the Thomas home that morning.

On the other hand two witnesses for defendant testify to having seen her late in the afternoon of that day on the streets, and the theory of the defense is that she committed suicide by drowning in the river near here her body was found, some time between Saturday afternoon and three o'clock on Sunday afternoon. There is also some evidence for defendant tending to show that he was not at his parent's home on Saturday morning during the hours when the crime was committed as charged. Such details of the evidence as it is necessary to refer to in passing upon the errors assigned
6 will be stated in the course of the opinion.

I. The indictment charging murder in the first degree is in two counts, in the first of which it is alleged that defendant caused the death of Mabel Scofield by administering and causing to be taken by her "a deadly amount of a certain deadly poison known as the hydrate of chloral, and certain poisons to the grand jurors unknown"; and the second count charged the commission of the crime by making an assault upon and killing Mabel Scofield "by some means, drugs, poisons, instruments and weapons," to the grand jury unknown. At the conclusion of the evidence the court withdrew the second count from the consideration of the jury and submitted the case solely upon the first count, and in this it is claimed there was error, inasmuch as some of the evidence indicated that the death was caused by the administration of chloroform, and that this evidence was not withdrawn from the consideration of the jury, so that the jury were allowed in passing upon the charge under the first count of the indictment to consider evidence which it is claimed was admissible only under the second count. But this contention is entirely without merit. Chloroform is not referred to in either count. Evidence that the death was caused by chloroform would be admissible only under the allegation charging the administration of some poison to the grand jurors unknown. The first count charges the administration of "hydrate of Chloral, and certain poisons to the grand jurors unknown," while the second count charges that death was caused "by some means, drugs, poisons, instruments, and weapons, to the grand jurors unknown." Clearly, therefore, proof of death by the administration of chloroform was as pertinent under the one count as under the other, and there could have been no prejudicial error in submitting only the first count to the consideration of the jury, although at the time when the evidence tending to show death by the administration of chloroform was introduced, the prosecution was depending upon both counts for a conviction. Considering the first count alone, there was no variance between the allegations and the proof in this respect.

7 II. With reference to the evidence tending to show an alibi, the court instructed the jury "that the defendant is not required to prove that defense beyond a reasonable doubt, but to entitle him to an acquittal it is sufficient if the evidence upon that point raises a reasonable doubt of the defendant's presence at the

time and place of the commission of the crime charged. The burden is upon the defendant to prove this defense for himself by a preponderance of evidence, that is, by the greater and superior evidence." It is claimed that this instruction is erroneous because it does not properly present the rule adopted by this court and which is in some respects peculiar to this state, that whil- the defense of alibi must be made out for defendant by a preponderance of the evidence relating thereto, nevertheless the defendant is entitled to acquittal if all the evidence, including that relating to alibi, leaves in the minds of the jury a reasonable doubt as to defendant's guilt of the crime charged.

State *vs.* Hogan, 115 Iowa 455;
State *vs.* McGarry, 111 Iowa 709;
State *vs.* Hathaway, 100 Iowa 225;
State *vs.* Maher, 74 Iowa 77.

The only question as we think is whether in the instruction quoted, the jury was directed to take into account the evidence relating to alibi in determining whether they were satisfied beyond a reasonable doubt on all the evidence as to defendant's guilt, and we are satisfied that the instruction plainly conveys this idea. The jury was told to acquit if the evidence as to alibi "raises a reasonable doubt of the defendant's presence at the time and place of the commission of the crime charged." Certainly it must have been understood from the instruction that in determining whether there was a reasonable doubt of defendant's guilt the evidence as to alibi should be considered regardless of whether defendant established the defense of alibi by a preponderance of the evidence. The instruction is quite similar in this respect to one which was held not prejudicial to the defendant in State *vs.* Worthen, 124 Iowa 408. It is
8 said in the Worthen case that the instruction given was more favorable to the defendant than it should have been, and perhaps the same thing is true in this case; but at any rate, there was clearly no error prejudicial to defendant.

III. With reference to the degree of the crime committed, the jury was instructed as follows:—"But if you find that the defendant Charles Thomas unlawfully, with bad intentions, caused poison to be taken by Mabel Scofield, which caused the death of the said Mabel Schofield you should find the defendant Charles Thomas guilty of murder in the first degree; but if you fail to so find, your verdict should be not guilty." An objection made to this charge is that a homicide committed by the unlawful administration of poison with bad intention is not necessarily murder, but that it may be manslaughter, depending upon the nature of the intent with which the poison was administered. The question is not as to the degree of murder, for it is provided in Code Sec. 4728 that "All murder which is perpetrated by means of poison * * * is murder in the first degree"; but the question is whether the crime might not be manslaughter. The abstract inquiry to which our attention is thus directed is this: May there be a homicide committed by the unlawful administration of poison under such circumstances as to render the perpetrator thereof guilty of a crime which does not constitute the

crime of murder; or in other words, does the fact of the unlawful and wrongful administration of poison causing death, in itself show that malice aforethought which characterizes murder as distinct from manslaughter: There can be but one answer to this question under the decisions of this court, and it is not necessary to go further in discussing the question for the present case. In State *vs.* Robinson, 126 Iowa 70, it was held that an indictment for murder by means of a felonious administration of poison need not specifically allege an intent to kill. In State *vs.* Wells, 61 Iowa 629, it was held that it was sufficient to charge that the poison was unlawfully administered, and not given with a good intention, and the court says:

9 "The administration of the poison unlawfully with a bad motive or intent under the statute constituted murder if death ensues * * * it is immaterial whether or not there is a specific intent to kill. It is fundamental that everyone is presumed to intend the necessary consequences of an act deliberately done by him." The result of our cases, as we understand them, is to hold that the administration of poison unlawfully and with bad intent, constitutes malice aforethought without specific intent to kill, just as a felonious act inflicting a grievous bodily injury supplies the malice aforethought necessary to constitute murder, although there is no specific intent to kill proven in connection with the infliction of such injury. Malice aforethought does not necessarily require for its existence an intent to take life. Death resulting from the attempt to commit any felony, even though its tendency in itself is not to cause death, will supply the malice aforethought necessary to constitute murder.

1 McClain's Criminal Law, Secs. 322, 325, 326.

Thus in State *vs.* Moore, 25 Iowa 128, it was held that death caused in the unlawful attempt to procure an abortion necessarily constituted murder, irrespective of whether there was any intent to take life or whether the crime of abortion was a felony; and it is said "that malice may be implied from unlawful acts dangerous to life committed without lawful justification." Certainly the unlawful administration of poison is an act also dangerous to life, and we see no reason why it does not necessarily amount in law to the malice afo*u*rethought which will characterize death resulting therefrom as murder. The general conclusion that any criminal homicide caused by the wrongful administration of poison is murder in the first degree is supported by numerous cases decided by this court. See

State *vs.* Bertoch, 112 Iowa 195;
State *vs.* Burns, 124 Iowa 207;
State *vs.* Van Tassel, 103 Iowa 6.

There was no error in the instruction given.

IV. One Taylor who testified that he was a practicing phy-

10 sician, although not admitted to practice under the laws of the state, and that he combined his practice of medicine with the occupation of painting and paper hanging, testified that on the Saturday morning on which the crime is charged to have been committed, defendant left a call at his office, in response to which he

went to the Thomas home on Woodland Avenue, about half past ten, and was met at the door by the defendant. As abstracted in the appellant's record, he testified: "I asked him what was the matter, and he said I was too late; that he had given some knockout drops and had killed a girl, and wanted me to pump the stomach out, or something to that effect, and said it was Mabel Scofield. I saw him afterwards at my office on Locust Street. He wanted to know why in hell I didn't come when he left the call for me, and said he had given too much knockout drops; that he didn't intend to and that it was a mistake." It may be remarked in passing that as to this very material testimony there was some corroboration in the testimony of the daughter of Taylor as to defendant's having left the call on Saturday morning to come to the Thomas home and as to his referring to poison in his subsequent conversation with Taylor.

On the theory that the statement of defendant to which this witness testified constitutes a confession, counsel for appellant claim that the court should have instructed the jury in accordance with the provisions of Code Sec. 5491 that "The confession of the defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense was committed." No such instruction was asked by the defendant; but irrespective of that, we think there was no error in failing to instruct on the theory that the statement was a confession. Defendant's statement was not that he had unlawfully or wrongfully or with bad motive administered poison. The statement itself negatives any unlawful intent, and what is said in regard to the act cannot be separated from the accompanying declaration as to intent so as to make the admission of the act itself a confession of crime.

State *vs.* Abrams, (Iowa) 108 N. W. 1041.

11 It was not therefore error on the part of the court to fail to instruct with reference to the statement as constituting a confession. Indeed it would have been error to treat the statement as a confession and instruct on this theory.

V. As tending to establish an alibi, witnesses were called to testify in behalf of defendant that during the Saturday forenoon when, as it is claimed, the crime was committed, by the defendant at the Thomas home, defendant was driving a hack at a funeral. In rebuttal two witnesses were called for the State who testified to a conversation with defendant on the following Sunday morning in which he declared that Mabel Scofield had committed suicide. It is to be noticed that this conversation, if it occurred as stated by the witnesses, was prior to the discovery of the body of Mabel Scofield in the river. Counsel for defendant objected at the time to the introduction of the testimony of these witnesses on the ground that it was not properly given in rebuttal, and they now contend that the overruling of the objection was error. It is well settled however, that the order of the introduction of evidence is a matter resting largely in the discretion of the trial court, and that the exercise of this discretion will not be interfered with on appeal

unless it is made to appear that the ruling was not in the furtherance of justice, and was prejudicial.

Yeager *vs.* Spirit Lake, 115 Iowa 593;
State *vs.* Yetzer, 97 Iowa 423;
State *vs.* Gadbois, 89 Iowa 25;
State *vs.* Bruce, 48 Iowa 530;
Hubbell *vs.* Ream, 31 Iowa 289.

There is not the slightest showing of prejudice to defendant in allowing this evidence to be introduced in rebuttal. No request was made for time within which to procure testimony to meet that of the witnesses thus examined, and as a matter of fact it appears from the record that subsequently the defendant did offer the testimony of several witnesses in sur-rebuttal with reference to
12 other matter testified to in the State's rebuttal. It does not appear in the record that the counsel for the State was aware of this evidence in time to have used it in making out their case in chief, and as suggested by counsel for defendant, concealed it until near the close of the case. Moreover, it seems to us that the evidence was properly introduced in rebuttal, for it tended to negative the theory of the defense. Certainly a false statement by defendant with reference to the fact of suicide, that is, a statement that suicide was the cause of death, made at a time before there was any knowledge on the part of any other person of facts indicating suicide, was admissible as tending to negative the explanation of suicide on which the defendant was relying.

VI. Misconduct of counsel for the prosecution in the closing argument to the jury is strongly insisted upon as a ground for reversal. Briefly, the misconduct charged was in going outside of the record in two respects, and in each case as claimed, in a manner highly prejudicial to the defendant. The first of these was in imputing bribery to counsel for defendant. It appeared from the evidence that one Noble, a witness for the defendant, who had testified to driving Mabel Scofield about the streets of Des Moines on the afternoon of the Saturday, on the morning of which she was murdered, as claimed by the prosecution, and who at the time he was a witness was an inmate of the county poorhouse, had gone from the office of defendant's attorneys to a place of business where he was acquainted, and, jingling three silver dollars in his hand had stated that he was to be a witness in the Mabel Scofield case. Counsel for the prosecution in argument made the most of this incident, jingling several coins in his hand and referring to one of the counsel for defendant in such language as to indicate that while there might not be legal evidence that he had bribed the witness, to a moral certainty he had done so. Without discussing from a professional standpoint the propriety or advisability of this kind of argument, we are only concerned now in determining
13 whether there was such misconduct as to require a new trial. It is not claimed that the court was remiss in giving to the defendant any protection to which he was entitled, so far as redress could be given or protection afforded, by reprimanding counsel or cautioning the jury as to the effect to be given by them to the argu-

ment. The sole contention is that irremediable error was committed for which a reversal must be granted. The argument of counsel is not open to the objection that it refers to matters outside of the record. The facts as to what Noble did and said were in the record, and counsel for the prosecution did not pretend that there was any evidence of bribery of the witness by defendant's counsel, nor that he had any information as to such bribery, not contained in the record itself. He simply made a charge based upon inference, and which on its face showed that *that* it had no other basis. It is not necessary to cite authorities to support our conclusion that this did not constitute such misconduct as to require a reversal.

The other misconduct of counsel complained of was in relating what is referred to in the record as his "Arizona Story." He detailed at some length an incident of his own experience in Arizona, invol-ing, briefly stated, the fact of his seeing a single drop of some liquid surreptitiously put into a glass of liquor and given to a man who almost instantly dropped dead and was robbed, and then placed in a sitting position in a chair, with a newspaper before him as though reading. It is claimed that counsel accompanied his description of the act by seating himself in a chair and imitating the position and attitude of the person referred to in his story. The objection made to this argument is that it brought to the attention of the jury facts not in the record, and bearing on the case in this, first, that it advised the jury that some such poison as chloral hydrate might produce almost instant death, and second, that it showed that a person dying from such poison might be afterwards placed in a sitting position. The pertinency of the second of these
14 suggestions is that witnesses testified to seeing a buggy containing two men with a young woman sitting on the seat between them driving in the direction of the river early on Sunday morning before Mabel Scofield's body was discovered, and that, when discovered, the limbs of her body were drawn up as they would be in a sitting position.

In the first place it is to be noticed that no objection was made to the part of counsel's argument in which he related the "Arizona story" until after the conclusion of the argument, when one of the counsel for defendant proceeded to dictate into the record objections that it was improper and inflam-atory; but he did not ask any action of the court save as he raised the point as a ground for new trial in his motion. If he thought the argument improper he should have made prompt objection so that opposing counsel might have been caused to desist, or asked some direction to the jury with a view of counteracting the effect of the improper argument if possible. No error of the court is pointed out in this connection, unless it was error under the circumstances to overrule the motion for new trial. In the second place, we have to say that mere misconduct of counsel is not enough, alone, to require the granting of a new trial, unless it appears to have been so prejudicial as to deprive the complaining party of a fair hearing of his case by the jury on the evidence. If the jurors were not influenced by the argument then there is no warrant for interference. The case is not one where counsel has

attempted to bring to the attention of the jury facts relating to the case itself, which do not appear from the testimony of witnesses. There may well be cases where we could say that the necessary result of suggestion facts not in the record was such as to preclude a fair consideration of the evidence on which alone the case was to be tried. But this is not such a case. The argument went beyond the fair limit of illustration and is to be condemned. But
15 the trial court had for consideration affidavits of jurors that they did not consider anything but the evidence introduced and the instructions given by the court, and we cannot hold as matter of law that the improper argument was prejudicial. There was nothing in the argument to suggest that the drop of poison put into the glass of liquor given to the man referred to in the illustration was chloral hydrate or chloroform, and no juror could be so ignorant as not to know that there are poisons which, though administered in small portions, produce almost instant death. There was no evidence whatever as to whether or not Mabel Scofield died while sitting in a chair or was placed in that position after death and before *rigor mortis* had set in. That question was wholly immaterial. The jurors could have learned from the argument no assumed or declared fact which, if believed to be true, would have guided them in finding a verdict.

In general, questions relating to the effect of alleged misconduct can be passed on by the trial judge much more satisfactorily than by an appellate court. The judge who hears the case is able to determine much more accurately whether, in view of all the surroundings, the misconduct was prejudicial, than we can. The trial judge expressed his conclusion in connection with the overruling of this ground in the motion and held that there was not such showing as to require the granting of a new trial; and we are not inclined to interfere with the result. As supporting this conclusion, see

State *vs.* Row, 81 Iowa 138;
State *vs.* McIntyre, 89 Iowa 139;
Hammond *vs.* Sioux City & P. R. Co., 49 Iowa 450;
State *vs.* Millmeier, 102 Iowa 692.

We find nothing in the alleged misconduct of counsel requiring the reversal of the conviction.

VII. Misconduct of the jury after retiring for deliberation is relied upon as a ground for reversal. The misconduct complained of consisted in some reference made by one or two members of the jury to the fact that defendant had not been a witness in his own behalf. The Statute, Code Sec. 5484, provides that
16 "Should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial refer to the fact that the defendant did not testify in his own behalf; and should they do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial." The statute itself specifies the consequence to follow a reference to the fact during the trial. It does not purport to prohibit a reference

to the fact by jurors in consultation, nor does it prescribe any remedy for such reference. We should certainly not be justified in extending the statute in the manner suggested by counsel. It would be obviously unwise to make the conclusiveness of the conviction dependent upon what the jurors might say to each other in consultation, unless it appeared that their verdict was the result of some manifest impropriety of conduct. If the showing as to the conduct of the jurors was admissible at all, prejudice was negatived by further showing on behalf of the state that the jury did not take into account the fact referred to in reaching their conclusion.

VIII. Complaint is made that the court did not instruct the jury with reference to certain alleged demonstrations by way of hissing and other indications of disapproval of the objections and arguments made by defendant's counsel. This ground of reversal is largely amplified in appellant's argument, but the complaint is rather that the defendant did not have a fair trial than that the court committed any error. The trial was somewhat sensational in its nature, was protracted, extending through twenty-three days, and was held in a public auditorium to which, by consent of counsel on both sides, it was adjourned by the court because of the insecurity of the temporary quarters in which court was being held during the construction of a new county court house. It appears that from 800 to 1000 people were constantly in attendance. Certainly there
17 was no impropriety in giving the defendant a public trial, and in adjourning court to more secure and commodi-us quarters for that purpose. Had the public been excluded, the defendant might well have complained. The showing as to hissing and other demonstrations is quite conflicting, but it does not appear, save in argument of counsel, that the court failed in any respect to discharge his duty with reference to securing a fair and impartial trial for the defendant. And we are bound to give to his conclusions as to what took place very considerable weight. His finding of fact in this respect, in ruling on this ground of the motion for a new trial, satisfies us that there was no such demonstration as to indicate that the jury were in any way subjected to popular pressure or undue influence. While any sort of demonstration in a court of justice is to be deprecated and should be repressed by the trial judge with the greatest vigilance and firmness, there is no such showing here as to lead us to believe that the judge who tried the case did not fully discharge his *futy* in this respect, and it is sufficient to say that we find no ground for setting aside the conviction on account of what took place at the trial, nor the conduct of the trial judge with reference thereto.

IX. Counsel argue at considerable length the insufficiency of the evidence to support the verdict. It would be wholly unprofitable to set out the evidence in detail. The opening statement as to what the evidence tended to show, and the other items of evidence which have been referred to *un* d*uscussing* the errors of law relied upon, indicate that beyond question there was sufficient evidence to support the verdict. If the testimony of the witnesses for the prosecution is to be believed, the jury were fully warranted in reaching a verdict

of guilty. The credibility of these witnesses was for the jury. As to some of them there was evidence to impeach their credibility. But on the other hand, the testimony of the witnesses for defendant who testified to facts necessarily inconsistent with defendant's guilt was also open to suspicion, either on account of direct
18 impeachment or the nature of the testimony given by them, and its inconsistency with the other testimony in the case. We could not with propriety, even if we desired to do so, enter upon an elaborate discussion of the conflict of testimony of these particular witnesses and indicate in what respects we would believe one witness rather than another. Our full duty is discharged and justice is administered in accordance with our system of law, which grants to the defendant the right to a jury trial and the right to have every doubt resolved in his favor, when we affirm the judgment of conviction based on the verdict of a jury after finding that he has had a fair trial *to* an impartial jury, that the verdict of the jury has support in the evidence, and that no error of law to his prejudice has been committed during the trial.

We are fully satisfied that the defendant has had a fair trial, that there is ample evidence to support the verdict, and that no prejudicial error was committed by the trial court, and the conviction is therefore

Affirmed.

19 Filed Nov. 19, 1907. Jno. C. Crockett, Clerk Supreme Court.

In the Supreme Court of the United States, October Term, 1907.

CHARLES THOMAS, Plaintiff in Error,

vs.

THE STATE OF IOWA, Defendant in Error.

Petition for Writ of Error to the Supreme Court of Iowa.

To the Honorable the Chief Justice of the Supreme Court of Iowa:

The petition of Charles Thomas respectfully shows that on the 24th day of October 1907, the Supreme Court of the State of Iowa rendered final judgment against him in a suit pending in said court wherein the State of Iowa was plaintiff, and the petitioner, who is a citizen of the United States, and of the State of Iowa, was defendant and appellant, affirming the judgment of the District Court of said State in and for Polk County in said suit, while the same was pending in said District Court, adjudging your petitioner guilty of the alleged crime of murder in the first degree, and sentencing your petitioner to imprisonment in the penitentiary of Iowa at Fort Madison for the term of his life at hard labor, and also adjudging that your petitioner pay the costs of said action taxed at $195.05 *dollars*, all of which will more fully appear by reference to the record and proceedings in said cause in said Supreme Court of Iowa.

20 That said Supreme Court of Iowa is the highest court in said state in which a final judgment in said suit can be had,

and the petitioner claims the right to remove said judgment of the Supreme Court of Iowa, and the records and proceedings in said suit to the Supreme Court of the United States by Writ of Error under the provisions of the Statutes of the United States in that behalf provided, because

First. There was drawn in question in said suit both in the District Court of said state in and for Polk County, and in the Supreme Court of said State of Iowa, the right of the defendant to have the jury by its verdict ascertain and determine the degree in which the defendant was guilty of the offense charged, the Statutes of Iowa having repealed the common law crime of murder, and enacted a statute defining the crime of murder and providing that the offense might be committed so as that the defendant would be guilty of murder in the first degree, of murder in the second degree, or of manslaughter, and that upon a trial the jury should ascertain and determine the degree of the offense of which the defendant was guilty; and thereby there was also drawn in question the validity of the Fourteenth Amendment to the Constitution of the United States which declares that "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any per-
21 son within its jurisdiction the equal protection of the laws;" that said constitutional provision was violated and the defendant herein, against his protests and objections made in each court, denied the privilege of a jury trial, and has been deprived of his liberty without due process of law, and the equal protection of the laws.

All of which more fully appears by the record and proceedings in said suit which was herewith submitted, and in which judgment, record, and proceedings manifest error hath happened, and doth appear to the great damage and injury of the petitioner.

That your petitioner, pursuant to said sentence, was committed to the said prison and penitentiary at Ft. Madison, and has continued therein in the execution of said sentence, down to the present time, and is still so imprisoned.

The petitioner, conceiving himself aggrieved by the judgment and decision of the Supreme Court of Iowa, in said suit, files herewith an Assignment of Errors as claimed by him in such decision, and prays the allowance of a Writ of Error returnable into the Supreme Court of the United States to the end that such errors may be corrected, and judgment of said Supreme Court of Iowa reversed, and proper relief granted unto your petitioner; that proper orders be made as to all necessary process therefor; that the nature, character and amount of any bond required — the course of the proceedings, shall be fixed by the court as by law provided.

CHARLES THOMAS, *Petitioner,*
By MULVANY & MULVANY,
C. C. COLE, *Attorneys.*

C. C. COLE,
Of Counsel.

22 Filed Nov. 19, 1907. Jno. C. Crockett, Clerk Supreme Court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Iowa, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Iowa, before you, at the September Term, 1907 thereof, between the State of Iowa, plaintiff and Charles Thomas, defendant, a manifest error hath happened, to the great damage of the said Charles Thomas, plaintiff in error, herein, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the United States Supreme Court at the City of Washington, D. C. together with this Writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of the Clerk of the Supreme Court of the United States on or before the 19 day of December, 1907, to the end that the record and proceedings aforesaid, being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

23 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of November in the year of our Lord one thousand nine hundred and seven.

Issued at office in Des Moines with the seal of the United States Circuit Court and dated as aforsaid.

[Seal U. S. Circuit Court, Southern District, Iowa.]

EDWARD R. MASON,
Clerk of U. S. Circuit Court, So. Dist. of Iowa,
By ROMA WOODS, *Deputy.*

Allowed by
SILAS M. WEAVER,
Chief Justice of the Supreme Court of Iowa.

[Seal of the Supreme Court of Iowa.]

SILAS M. WEAVER,
Chief Justice Supreme Court of Iowa.

24 Filed Nov. 19, 1907. Jno. C. Crockett, Clerk Supreme Court.

UNITED STATES OF AMERICA:

To the State of Iowa, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant

to a Writ of Error filed in the Clerk's Office of the Supreme Court of the United States, wherein Charlie Thomas is plaintiff in error, and you, the State of Iowa, are defendant in error, to show cause, if any there be, why the judgment rendered against the said Charles Thomas, plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Silas M. Weaver, Chief Justice of the Supreme Court of Iowa, this 19th day of November, A. D. 1907.

S. M. WEAVER,
Chief Justice Supreme Court of Iowa.

Due timely and legal service of the foregoing Citation is hereby admitted and acknowledged this 19th day of November 1907.

H. W. BYERS,
Att'y General of Iowa.
C. W. LYON,
Assistant Att'y General.

I acknowledge service of a copy of the above Citation this 19th day of November 1907.

ALBERT B. CUMMINS,
Governor.

25 Filed Nov. 19, 1907. Jno. C. Crockett, Clerk Supreme Court.

In the Supreme Court of the United States, October Term, 1907.

CHARLES THOMAS, Plaintiff in Error,
vs.
THE STATE OF IOWA, Defendant in Error.

Assignment of Errors.

The petitioner, Charles Thomas, as Plaintiff in Error against the State of Iowa, as Defendant in Error, in the petition for a Writ of Error to the Supreme Court of Iowa, filed herewith, says that there is manifest error in the judgment and decision of the said Supreme Court of Iowa in the suit referred to in said petition in this:

That the Supreme Court of Iowa erred—

First. In affirming the action and decision of the District Court of Iowa in and for Polk County whereby said court gave to the jury instruction Number Two as shown by the record and proceedings in said Supreme Court.

Second. In affirming the action and decision of the District Court of Iowa in and for Polk County whereby said court gave to the jury instruction Number Three as shown by the record and proceedings in said Supreme Court.

Third. In affirming the action and decision of the District Court of Iowa in and for Polk County whereby said court gave to the jury

instruction Number Four as shown by the record and pro-
26 ceedings in said Supreme Court.

Fourth. In affirming the action and decision of the District Court of Iowa in and for Polk County whereby said court gave to the jury instruction Number Five as shown by the record and proceedings in said Supreme Court.

Fifth. In affirming the action and decision of the District Court of Iowa in and for Polk County whereby said Court gave to the jury instruction Number Six as shown by the record and proceedings in said Supreme Court.

Sixth. In affirming the action and decision of the District Court of Iowa in and for Polk County whereby said court gave to the jury instruction Number Fourteen as shown by the record and proceedings in said Supreme Court.

Seventh. In affirming the ruling and judgment of the District Court in not giving to the defendant a fair and impartial trial guaranteed to a defendant in the Costitution, and the law.

Wherefore the petitioner, Charles Thomas, prays that said Judgment of the Supreme Court of Iowa, and of the District Court of Iowa in and for Polk County, be reversed, annulled, and set aside, and that he be discharged and released from imprisonment and payment of costs and all other effects thereof.

MULVANY & MULVANY,
C. C. COLE, *Attorneys.*

C. C. COLE, *Counsel.*

27 In the Supreme Court of the United States, October Term, 1907.

CHARLES THOMAS, Plaintiff in Error,
vs.
THE STATE OF IOWA, Defendant in Error.

Amended and Substituted Assignment of Errors.

The petitioner, Charles Thomas, as Plaintiff in Error against the State of Iowa, as Defendant in Error in the petition for a Writ of Error to the Supreme Court of Iowa filed herein, says that there is manifest error in the judgment and decision of the said Supreme Court of Iowa in the suit referred to in said petition in this

That the Supreme Court of Iowa erred—

First. In affirming the ruling and decision of the District Court of Iowa in and for Polk County in giving to the jury upon the trial of said cause. Instruction Number Two, which instruction is in the words and figures following, to-wit:

"I next call your attention to the provisions of the code upon which this cause is based.

Section 4727 defines murder as follows: 'Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder.'

You observe that to be murder must be with malice aforethought; it is this that distinguishes murder from excusable or justifiable killing of a human being.

Section 4728 so far as applicable to this case is as follows: All murder that is perpetrated by means of poison is murder in the first degree, and shall be punished with death, or imprisonment for life, at hard labor in the penitentiary, as determined by the jury.'

When murder, that is, killing a human being with malice aforethought, is perpetrated by means of poison, the law implies because of the nature of the act, that it was done intentionally, wilfully, deliberately, premeditatedly and with malice aforethought and therefore declares it to be murder in the first degree.

Such being the law you are not called upon to consider as to murder in the second degree or manslaughter. Your verdict must be guilty *or* murder in the first degree or not guilty."

28 Second. In affirming the ruling and decision of the District Court of Iowa in and for Polk County in giving to the jury upon the trial of said cause Instruction Number Three, which instruction is in the words and figures following, to-wit:

With these definitions and provisions of the law in mind, you will now inquire and determine whether murder as defined was committed as alleged in the indictment.

It is conceded that Mabel Scofield died in this county, in the month of October, 1899.

The first allegation in the charge for you to decide is whether Mabel Scofield came to her death by means of poison, and in doing so you will take into consideration the evidence as to her physical condition, the circumstances preceding her death, the condition of the body as to the presence or absence of poison, evidence if any of death by drowning, and all evidence fairly tending to show whether poison was the cause of her death.

If, upon thus inquiring, you fail to find beyond a reasonable doubt as hereafter explained, that the death was caused by poison, you need not inquire further but return your verdict of not guilty.

Third. In affirming the ruling and decision of the District Court of Iowa in and for Polk County in giving to the jury upon the trial of said cause, instruction Number Four, which instruction is in the words and figures following, to-wit:

If upon inquiry as last directed, you find that the death of Mabel Scofield was caused by means of poison, you will then inquire and determine whether the poison was unlawfully administered to her. When a person with good intentions, and with no wrongful purpose, or innocently by mistake, administers poison to another, it is not murder, though death *insues*, as in such cases there is an absence of criminal intent, and of malice aforethought. But, where one person administers poison to another, such as to kill, with a bad motive and intent, if death *insues* from the administration of such poison, it is murder in the first degree, and this is true, although there was no specific intent to kill.

Fourth. In affirming the ruling and decision of the District Court of Iowa in and for Polk County in giving to the jury upon the

trial of said cause instruction Number Five, which instruction is in the words and figures following, to-wit:

As you are to decide the material issues already pointed out upon the evidence, I next instruct you as to the measure of evidence required to convict, and the rules by which you are to determine the credibility of the witnesses, and the weight to be given to their testimony.

As to the measure of evidence required to convict, I first instruct you that the defendant Thomas is presumed to be innocent of this charge, and that the burden is upon the state to overcome this presumption, and to prove each of said material allegations of the charge beyond a reasonable doubt.

29 Section 5376 of the Code provides: "Where there is a reasonable doubt of the defendant being proven to be guilty he is entitled to an acquit-al." No mere weight of evidence is sufficient unless it excludes all reasonable doubt as to guilt. The proof of guilt must be inconsistent with any other rational supposition; the doubt that entitles to an acquittal must be reasonable, not unreasonable, real, not captious or imaginary, not forced or artificial, but must be a doubt which without being sought after, natu-ally and fairly arises in the mind upon consideration of all the evidence in the case. The proof is sufficient if it establishes guilt to a moral certainty; such a certainty as fully and fairly convinces the understanding of the jurors.

If upon inquiring as directed you have a reasonable doubt as just explained as to whether Mabel Scofield's death was caused by poison, or if so caused, whether the defendant administered it or was concerned in administering it, your verdict should be not guilty; but if you find each of these propositions proven beyond a reasonable doubt, your verdict should be guilty of murder in the first degree.

Fifth. In affirming the ruling and decision of the District Court of Iowa in and for Polk County in giving to the jury upon the trial of said cause, instruction number six, which instruction is in the words and figures following, to-wit:

If you have found that the death of Mabel Scofield was caused by poison unlawfully administered to her you will then inquire whether the defendant, Thomas, caused Mabel Scofield to take the poison or was concerned in causing it to be done.

If you find that the defendant, Charles Thomas, unlawfully with bad intention caused poison to be taken by Mabel Scofield which caused the death of the said Mabel Scofield, you should find the defendant, Thomas, guilty of murder in the first degree, but if you fail to so find, your verdict should be not guilty.

Sixth. In affirming the ruling and decision of the District Court of Iowa in and for Polk County in giving to the jury upon the trial of said cause, instruction number fourteen, which instruction is in the words and figures following, to-wit:

You are to try and determine this case according to the evidence produced and submitted to you in open court, on this trial, and the law as given you in charge by the court in these instructions, and upon nothing *less*.

You are the sole judges of the facts in the case, and the court in-

structs you as to the law. The court has not, however, attempted nor intended to embody in any one instruction all of the law applicable to the case. You are to consider and construe all of the instructions together, and apply them as a whole to the evidence in the case.

Seventh. In affirming the ruling and decision of the District Court of Iowa in and for Polk County whereby the defendant did not have a fair and impartial trial as guaranteed to a defendant under the Constitution and the law in that the defendant was in effect denied the right of trial by jury for that the jury was not permitted
30 to determine the grade of the offence with which he was charged, but the court arbitrarily determined that for itself and the jury.

All of which more fully appears by record and proceedings in said suit which are herewith submitted, and in which judgment, record and proceedings manifest error hath happened and doth appear to the great injury and damage of the petitioner.

The petitioner, conceiving himself aggrieved by the judgment and decision of the Supreme Court of Iowa in said suit, files herewith this assignment of errors as claimed by him in such decisions and rules and prays the allowance of a Writ of Error returnable into the Supreme Court of the United States to the end that such errors may not occur, the judgment of said Supreme Court of Iowa reversed and proper relief granted unto your petitioner, that proper orders be made as to all necessary process therefor, and for other matters as provided by law.

MULVANY & MULVANY,
C. C. COLE,
Attorneys for Petitioner

C. C. COLE,
Of Counsel.

[Endorsed:] 9. 24375. State of Iowa *v.* Charles Thomas, Appellant. Amended and Substituted Assignment of Errors. Filed Dec. 12, 1907. Jno. C. Crockett, Clerk Supreme Court.

31 Filed Nov. 19, 1907. Jno. C. Crockett, Clerk Supreme Court.

In the Supreme Court of Iowa.

THE STATE OF IOWA
vs.
CHARLES THOMAS.

Bill of Exceptions.

Be it remembered that on the trial of the case of the State of Iowa against Charles Thomas in the Supreme Court of Iowa, there legally appeared and was duly made of record in the said Supreme Court of Iowa each and every one of the following matters, to-wit:

That on the 31st day of December, 1904, the Grand Jury of Polk County, Iowa, returned into the District Court of Iowa in and for said Polk County, an indictment against said Charles Thomas, charging him with the crime of Murder in the first degree,—said indictment was in words and figures as follows:

"The State of Iowa against Charles Thomas. Indictment for murder in the first degree. The grand jury of the County of Polk, in the State of Iowa, being legally empannelled, sworn and charged in the name and by the authority of the State of Iowa accuse Charles Thomas of the crime of murder in the first degree, committed as follows:

Count 1.

The said Charles Thomas on the 31st day of October, A. D. 1899, in the County of Polk, and State of Iowa, did wilfully, unlawfully, feloniously, deliberately, premeditatedly, and of his malice aforethought and with the specific intent and purpose to kill and murder one Mable Scofield, a human being then and there being — administer and cause to be taken by the said Mabel Scofield into the stomach and body of the said Mabel Scofield a deadly quantity of a cer-
32 tain deadly poison, known as hydrate of chloral, and certain poisons to the grand jurors unknown, he, the said Charles Thomas, then and there well knowing the same to be a quantity, quality and kind as so administered and taken as aforesaid was a deadly poison, by means of the administering of which deadly poison into the stomach and body of the said Mabel Scofield, she, the said Mabel Scofield, became then and there mortally sick and distempered in her body and person, and she the said Mabel Scofield, thence and thereafter continually suffered, and languished, and then and there languishing did die, as the result of the said mortal sickness of body and person, caused as aforesaid by the felonious administering and taking of said deadly poison aforesaid and so the said Charles Thomas did in the manner and form aforesaid wilfully, unlawfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, and with the specific intent and purpose to kill and murder her, the said Mabel Scofield, said murder being then and there perpetrated by the said Charles Thomas by means of poison aforesaid.

Count 2.

The grand jurors of the county and state aforesaid being legally empannelled, sworn and charged as aforesaid, upon their oaths aforesaid, do further find, aver, present and say that the said Charles Thomas on the 21st day of October, A. D. 1899, in the county and state aforesaid in and upon the body and person of one Mable Scofield, a human being, then and there being wilfully, unlawfully, feloniously, deliberately, premeditatedly, and of his malice
33 aforethought did make an assault, and him, the said Charles Thomas, in some way and manner, did by some means, drugs, poison, instruments and weapons to the grand jury aforesaid unknown, then and there did wilfully, unlawfully, feloniously, de-

liberately, premeditatedly and of his malice aforethought, deprive of life so that she, the said Mabel Scofield, then and there died. It is the intention to charge but one offense in this indictment, to-wit: Murder in the first degree, the same being laid in two counts to meet the evidence as it may arise on the trial of this cause. The more particular facts constituting the offense herein charged, and of the time, place and manner of the commission thereof, being to the grand jurors at this time unknown.

Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Iowa."

That the said defendant Charles Thomas upon arraignment for trial upon said indictment, pleaded not guilty; and thereupon and on the issues thus joined, the case came on regularly for trial before Hon. A. H. McVey, Judge, and a jury. The State introduced as a witness W. S. Taylor, who testified: "I live at Kingsley, Iowa. In October 1899 I was practicing medicine in Des Moines. I am not a graduate of any school. I knew Charlie Thomas in that year. I saw him the day before the body was found in the river, at
34 Woodland Avenue on Saturday, the day before at his home. I was called there to make a professional call. The call was left for me with my daughter and I went up there. I saw Charlie Thomas in the doorway of the house. I asked him what was the matter, and he said I was too late, that he had given some knock out drops and had killed a girl, and wanted me to pump the stomach out, or something to that effect, and said it was Mabel Schofield. I saw him afterwards at my office on Locust Street. He wanted to know why in hell I did not come when he left the call for me; and said he had given too much knock out drops; that he did not intend to and that it was a mistake."

The state introduced further evidence tending to prove the averments contained in the indictment.

The defendant Charles Thomas, then introduced evidence tending to prove the alibi of himself on the Saturday, the day before the body was found in October 1899, as pleaded by him, thereby negativing the testimony of Dr. Taylor. Then further introduced evidence tending to rebut and disprove the evidence introduced by the State, and also tending to controvert the averments of the indictment.

After concluding the taking of the evidence in the case, the Judge, after stating the issues, and withdrawing the second count of the indictment from their consideration, gave to the jury the following, among other instructions, none of the other or
35 omitted instructions, however, had any bearing or influence tending to modify, alter, change or affect any or either of those herein set out, to-wit:

II.

"I next call your attention to the provisions of the code upon which this charge is based.

Section 4727 defines murder as follows: "Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder."

You observe that to be murder must be with malice aforethought; it is this that distinguishes murder from excusable or justifiable killing of a human being.

Section 4728 so far as applicable to this case is as follows: "All murder that is prepetrated by means of poison is murder in the first degree, and shall be punished with death, or imprisonment for life, at hard labor in the penitentiary, as determined by the jury."

When murder, that is, killing a human being with malice aforethought, is perpetrated by means of poison, the law implies because of the nature of the act, that it was done intentionally, wilfully, deliberately, premeditatedly and with malice aforethought, and therefore declares it to be murder in the first degree.

Such being the law you are not called upon to consider as to murder in the second degree or manslaughter. Your verdict must be guilty of murder in the first degree or not guilty.

III.

With these definitions and provisions of the law in mind,
36 you will now inquire and determine whether murder as defined was committed as alleged in the indictment.

It is conceded that Mabel Scofield died in this county, in the month of October, 1899.

The first allegation in the charge for you to decide is whether Mabel Scofield came to her death by means of poison, and in doing so you will take into consideration the evidence as to her physical condition, the circumstances preceding her death, the condition of the body as to the presence or absence of poison, evidence if any of death by drowning, and all evidence fairly tending to show whether poison was the cause of her death.

If, upon thus inquiring, you fail to find beyond a reasonable doubt as hereafter explained, that the death was caused by poison, you need not inquire further but return your verdict of not guilty.

IV.

If upon inquiry as last directed, you find that the death of Mabel Scofield was caused by means of poison, you will then inquire and determine whether the poison was unlawfully administered to her. When a person with good intentions, and with no wrongful purpose, or innocently by mistake, administers poison to another, it is not murder, though death insues, as in such cases there is an absence of criminal intent, and of malice aforethought. But, where one person administers poison to another, such as to kill, with a bad motive and intent, if death insues from the administration of such poison, it is murder in the first degree; and this is true, although there was no specific intent to kill.

37 V.

As you are to decide the material issues already pointed out upon the evidence, I next instruct you as to the measure of evidence required to convict, and the rules by which you are to determine the

credibility of the witnesses, and the weight to be given to their testimony.

As to the measure of evidence required to convict, I first instruct you, that the defendant Thomas is presumed to be innocent of this charge, and that the burden is upon the state to overcome this presumption, and to prove each of said material allegations of the charge beyond a reasonable doubt.

Section 5376 of the Code provides: "Where there is a reasonable doubt of the defendant, being proven to be guilty he is entitled to an acquittal." No mere weight of evidence is sufficient unless it excludes all reasonable doubt as to guilt. The proof of guilt must be inconsistent with any other rational supposition; the doubt that entitles to an acquittal must be reasonable, not unreasonable, real, not captious or imaginary, not forced or artificial, but must be a doubt which without being sought after, naturally and fairly arises in the mind upon consideration of all the evidence in the case. The proof is sufficient if it establishes guilt to a moral certainty; such a certainty as fully and fairly convinces the understanding of the jurors.

If upon inquiring as directed you have a reasonable doubt as just explained as to whether Mabel Scofield's death was caused by poison or if so caused, whether the poison was unlawfully administered, whether the defendant administered it or was concerned in administering it, your verdict should be not guilty; but if you find each of these propositions proven beyond a reasonable doubt, your verdict should be guilty of murder in the first degree.

VI.

If you have found that the death of Mabel Scofield was caused by poison, unlawfully administered to her you will then inquire whether the defendant, Thomas, caused Mabel Scofield to take the poison or was concerned in causing it to be done.

If you find that the defendant, Charles Thomas unlawfully with bad intention caused poison to be taken by Mabel Scofield which caused the death of the said Mabel Scofield, you should find
38 the defendant, Thomas, guilty of murder in the first degree, but if you fail to so find, your verdict should be not guilty.

XIV.

You are to try and determine this case according to the evidence produced and submitted to you in open court, on this trial, and the law as given you in charge by the court in these instructions, and upon nothing else.

You are the sole judges of the facts in the case, and the court instructs you as to the law. The court has not, however, attempted nor intended to embody in any one instruction all of the law applicable to the case. You are to consider and construe all of the instructions together, and apply them as a whole to the evidence in the case.

That at the time of the giving of each of said instructions the defendant, Charles Thomas, by his counsel objected to each and all of them and duly excepted to the ruling of the court in giving said instructions and each thereof to the jury.

After the giving of the said and other instructions to the jury, they retired in charge of a sworn bailiff to consider of their verdict. Thereafter the jury returned into court with their verdict of Guilty of Murder in the First Degree as charged in the indictment, and that afterwards and in due time and manner, the defendant, Charles Thomas, by his counsel, moved the Court to arrest the judgment, set aside the verdict and grant him a new trial upon the following, (among other) grounds. The Court erred in giving to the jury instruction Number Two.

The Court Erred in giving to the jury instruction Number Three.

The Court erred in giving to the jury instruction Number

39 Four.

The Court erred in giving to the jury instruction Number five.

The Court erred in giving to the jury instruction Number Six.

The Court erred in giving to the jury instructions Number Fourteen.

That by error of the Court the defendant has not had a fair and impartial trial as guaranteed to a defendant under the constitution and the law.

At the conclusion of the arguments upon the said motion, the said Court overruled the same, entered judgment against the defendant upon the verdict of the jury, and sentenced the defendant, Charles Thomas to imprisonment at hard labor in the penitentiary at Fort Madison for and during the term of his natural life. To each and all of which, the defendant by his counsel at the time duly excepted.

An appeal was duly taken from the judgment and sentence so rendered and pronounced by the District Court of Iowa in and for Polk County, to the Supreme Court of Iowa. On such appeal the entire record of the proceedings in the District Court of Polk County were filed and made of record in the Supreme Court including all the evidence introduced together with the objections, rulings and exceptions made and taken in connection therewith; also the instructions to the jury given by the Court and exceptions thereto; and also the motion in arrest of judgment to set aside the verdict and for a new trial together with grounds therefor.

Under the rules of practice in the Supreme Court of Iowa no assignment of errors is required or allowed; but the questions

40 made and discussed by counsel on the hearing in the Supreme Court were such as arise upon the record, the exceptions and the motion in arrest, and for a new trial, as shown hereinbefore, and among them that the Court below erred in giving to the jury each of the instructions set out in this bill of exceptions, and numbered respectively, Two, Three, Four, Five Six and Fourteen, and that by said instructions the said District Court of Iowa in and for Polk County denied to this plaintiff in error the right of trial by jury, in that the court by said instructions determined the degree of the crime of murder of which the jury should find the defendant guilty, if at all, whereas by the common law and by the express statute of Iowa, the degree of the offense is a matter for the jury to determine, thereby in effect deprived the plaintiff in error of his liberty without due process of law.

That upon the trial and hearing of the case in the Supreme Court of Iowa, the parties, respectively, to-wit: The State of Iowa, and also the defendant and appellant, Charles Thomas, by their respective counsel, submitted arguments both in print and orally wherein they discussed the questions aforesaid, and all others arising upon the record.

Afterwards and on to-wit: November twenty-first in 1906 the Supreme Court filed and announced its opinion in the case, affirming in all things the proceedings judgment and sentence of the District Court of Polk County. Said opinion is found in 109 N. W. Rep. 990. Thereafter and in due time and manner the
41 *the* defendant, the plaintiff in error herein, Charles Thomas, filed his petition for re-hearing, which was made of record, and which, later, came on for hearing and was further and fully heard upon oral argument and duly submitted to the Court. Said petition for re-hearing was afterwards and on the twenty-fourth day of October, 1907, overruled and final judgment affirming the judgment and sentence of the District Court of Polk County was duly rendered. To each and all of which proceedings and judgment, the defendant, Charles Thomas, by his counsel, in proper time and manner, duly excepted, and all said matters and things are hereby made of record in said Court. This bill of exceptions is signed sealed and filed during the same term of Court at which the petition for re-hearing was overruled, and final judgment was rendered on this 24th day of October 1907.

S. M. WEAVER,
Chief Justice.

42 In the Supreme Court of Iowa.

STATE OF IOWA, *ss:*

I, Jno. C. Crockett, Clerk of the Supreme Court of Iowa, do hereby certify, that the foregoing is a true record of the filings of papers in my office; a full true and correct transcript of the record entries; judgment entry and copy of the opinion filed, all in the case of the State of Iowa *vs.* Charles Thomas, Appellant.

I further certify that the foregoing are the original Petition for Writ, Writ of Error and Citation filed in the cause of Charles Thomas, plaintiff in error, *vs.* The State of Iowa, Defendant in Error and that true copies thereof have been retained in my office.

In testimony whereof, witness my signature and the seal of said Court affixed at my office in the City of Des Moines, Iowa, this 26th day of November, 1907.

[Seal of the Supreme Court of Iowa.]

JNO. C. CROCKETT,
Clerk of the Supreme Court of Iowa.

Endorsed on cover: File No. 20,936. Iowa supreme court Term No. 533. Charles Thomas, plaintiff in error, *vs.* The State of Iowa. Filed December 16, 1907. File No. 20,936.

JAN 9 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

CHARLES THOMAS, *Plaintiff in Error,*
vs.
THE STATE OF IOWA, *Defendant in Error.*
NO. 533.

MOTION TO ADVANCE.

C. C. COLE,
Of Counsel for Plaintiff in Error.

H. W. BYERS, Attorney General,
Of Counsel for Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

CHARLES THOMAS, *Plaintiff in Error*,
vs.
THE STATE OF IOWA, *Defendant in Error*.
NO. 533.

MOTION TO ADVANCE.

The plaintiff in Error, Charles Thomas, states that this cause is a Writ of Error to the Supreme Court of Iowa and involves the question of the correctness of a judgment of that court whereby this plaintiff in error is adjudged guilty of murder in the first degree and sentenced to the penitentiary at Fort Madison, Iowa, at hard labor during the term of his natural life.

The question involved is as to the right of the plaintiff in error to a trial by jury as to the degree of the crime with which he was charged—the Statute of Iowa having repealed the common law crime of murder, and enacted in lieu thereof that said crime should consist of two degrees, and that the jury should ascertain and determine the degree by their verdict; notwithstanding which the trial court refused to allow the jury so to do, but the trial judge determined the degree and so instructed the jury, and the Supreme Court of Iowa, affirmed the ruling and judgment.

The plaintiff in error is unable to give bail and ever since the judgment and sentence were pronounced has been and now is imprisoned at hard labor in the penitentiary at Ft. Madison, Iowa. That he is advised by his counsel, and he does himself so con-

fidently believe, that said judgment is illegal and unconstitutional and will be reversed. That the plaintiff ought not to be so kept imprisoned any longer than reasonably necessary to justly determine the questions to be submitted to the court.

WHEREFORE the plaintiff in error most respectfully asks and moves the court to advance the time for the argument and hearing of this case to the earliest date convenient to the court and consistent with its other business.

Very respectfully submitted.

C. C. COLE,
Of Counsel for Plaintiff in Error.

To Hon. H. W. Byers,
Attorney General of the State of Iowa:

The above motion will be submitted to the Court on Monday January 13, 1908, or as soon thereafter as will suit the convenience of the Court.

C. C. COLE,
Counsel for Plaintiff in Error.

The Attorney General of the State of Iowa, as counsel for the defendant in error, hereby accepts due and legal service of the above and foregoing motion to advance; ~~and also hereby expresses his desire to join in said motion,~~ and consents that the motion may be submitted to and heard by the Court on Monday, January 13, 1908, or as soon thereafter as shall suit the convenience of the Court, pursuant to the notice therefor which is hereby accepted.

Dated at Des Moines, Iowa, this second day of January, 1908.

FEB 14 1
JAMES H. McK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

CHARLES THOMAS, *Plaintiff in Error,*

vs.

THE STATE OF IOWA, *Defendant in Error,*

NO. 533.

CHESTER C. COLE and
MULVANEY & MULVANEY,
Of Counsel for Plaintiff in Error.
H. W. BYERS, *Attorney General.*
C. W. LYON, *Assistant Attorney General.*
Of Counsel for Defendant in Error.

STATEMENT AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

At about three oclock in the afternoon of Sunday, October 22, 1899, the body of Mabel Schofield, full dressed with hat and gloves on, was found in a bayou of the Des Moines river just above the dam, in the City of Des Moines. She was a girl aged about twenty-four years, born and raised in an adjoining

county, and a few weeks before, had come to Des Moines to learn dressmaking. She boarded and roomed with a girl relative at the home of the parents of the plaintiff in error, Charles Thomas. The public was divided in sentiment between murder and suicide as the cause of death, and the police were reported as diligent in efforts to discover the verity. No developments were made until January, 1902, when an information was filed before a magistrate, charging Charles Thomas with the murder; but after a full hearing, the magistrate held there was not sufficient cause for believing the defendant guilty of the offense, and ordered him discharged. After this trial, a reward of twenty-five hundred dollars was offered for the arrest and conviction of the murderer of Mabel Schofield, and the matter was brought before successive grand juries without avail, until December 31, 1904, when the indictment was returned into court, upon which the accused therein, Charles Thomas, was tried and convicted by the verdict of the jury which was returned into court on the fourth day of March, 1905. Judgment and sentence thereon, to imprisonment at hard labor for life, were rendered by the trial court, and on appeal therefrom to the supreme court of the state, the same were affirmed, and hence this writ of error.

The facts relating to the legal questions submitted, will be stated in connection therewith.

ARGUMENT.

While it is true that the ultimate legal proposition involved in this case is as to the practical denial of the right to a trial by jury, yet it will conduce to perspicuity to divide the discussion under several successive points.

I

. . . *The crime of murder and all other crimes, as defined by the common law, does not obtain in Iowa—all having been repealed or superseded by the enactment of the Code of* 1851.

This question came before the Supreme Court of Iowa in 1860 in the case of Estes vs. Carter, 7 Iowa 400. It is there said: "This presents the question, not before raised in this court, that we are aware of, whether the courts of this state may take cognizance of and punish offenses at common law, which are not included and specified by name in our criminal code. .....Whilst, therefore, the principles of the common law do enter into all our adjudications when the jurisdiction of our courts over criminal offenses has been established by law, still they do not confer upon the courts in this state the power to try and punish an offense that is such at common law, but which has not been ordained as such by the supreme law making power of this state.....Besides, the statutory offenses so nearly cover all the common law offenses, that it is reasonable to infer that those which are omitted were intended to be excluded."

See also The State v. Moore 25 Iowa 128.

The State vs. Hayes, 98 Iowa 619 (i. e.), 625.

II.

When the legislature of Iowa repealed the common law defining the crime of murder and affixing the uniform penalty of death, it also enacted in lieu or place thereof, as follows:

(4727) "Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder.

(4728) "All murder which is perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, is murder in the first degree, and shall be punished with death, or imprisonment for life at hard la-

bor in the penitentiary, as determined by the jury, or by the court, if the defendant pleads guilty.

(4729) Whoever commits murder otherwise than as set forth in the preceding section is guilty of murder of the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term of not less than ten years.

(4730) Upon the trial of an indictment for murder, the jury, if it finds the defendant guilty, must inquire, and by its verdict ascertain and determine the degree; but if the defendant is convicted upon a plea of guilty, the court must, by the examination of witnesses, determine the degree, and in either case must enter judgment and pass sentence accordingly."

Code of Iowa 1897, Title XXIV, Ch. 2, Sections 4727-8-9-30.

III.

Let us first ascertain the proper construction and true meaning of the first part of the second paragraph (4728) *of the statute dissociate from the last paragraph,* (4730) *requiring the jury to determine the degree.*

The language of the statute defining the first degree is: "All murder which is perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing. . . . is murder in the first degree." The word "poison" is manifestly used in its generic sense and includes remedial agents used multiplied times daily by our best medical practitioners. In such frequent use it doubtless sometimes happens that death results therefrom. But it is clear, beyond question, that the statute does not apply in such case to the physician administering the poison as a remedy. Nor would it apply to administering by mistake. Other illustrations will readily occur to the inquirer.

Since, then, it is very manifest that every death caused by means of poison is not, by the statute, made murder in the first degree, we are forced to inquire what murders or deaths by means of poison are within the statute. The answer is made easy by the very language of the statute itself, which declares it must be a "wilful, deliberate and premeditated killing." Poison may be administered in many ways and for many purposes, and, indeed with many states, conditions and intents of mind and purpose, but it is only when administered with a wilful, deliberate and premeditated purpose of killing, that it amounts to murder in the first degree. The proof of the crime is not complete by showing conclusively that the defendant administered the poison, which resulted in the killing; but the state must go further and prove that it was administered with a wilful, deliberate and premeditated purpose of killing. Whether or not the poison was so administered is always a question of fact for the jury—it is never a question of law for the court.

The doctrine we contend for has been maintained by the supreme court of Connecticut in the State vs. Dowd, 19 Conn., 387, which was a case of death by poisoning. The indictment charged murder in the first degree in each of the counts by the administration of poison. The jury found the defendants guilty of murder in the second degree. Thereupon the defendants moved in arrest of judgment upon the ground that the verdict did not answer the issue, and was such as the jury could not legally render upon the indictment. The statute of Connecticut, which is given in the opinion, is identical with the Iowa statute and of the other states referred to. We quote from the opinion, 391:

"In most cases mentioned in the statute, as constituting

the crime of murder in the first degree, the lesser crime is manifestly included. Thus, if the charge were that the murder was committed by the accused while lying in wait, the jury might find that it was not so committed, and convict him only of the lesser offense. So, if it were averred that the act was done by him while attempting to commit the crime of arson or rape, the jury might find that part of the charge untrue, but still convict the prisoner of murder in the second degree. Now, if the same rule applies to a case where the charge is for murder by poisoning, then the conviction, in this case, was legal. The language of the statute strongly favors such a construction. It provides that murder perpetrated by means of poison, or by lying in wait or by any *other* kind of wilful, deliberate and premeditated killing, shall be murder in the first degree; thereby implying that in all cases the crime must be the result of a wilful, deliberate and premeditated act. Hence, if any case can be supposed, where murder may be committed by means of poison, and not be the result of such an act, then a conviction of murder in the second degree may be legal. And we do not feel ourselves authorized to say that the case under consideration might not have been one of that description; and consequently that the verdict is not right. Indeed, we are rather inclined to consider such the fair construction of the statute, especially as it is a highly penal one, and such construction operates against the greater severity.

But, however this may be, there is another provision in the statute more unequivocal. It says that the jury, if they find the accused guilty, shall ascertain in their verdict whether it be murder in the first or second degree. And if he be convicted by confession, the court shall determine the degree of crime, by examination of the witness. This provision is positive, without any exception or qualification; and we do not feel authorized, in the construction of a statute like this, involving the life or death of the person accused, to make an exception where the legislature have made none."

In he case at bar the *quasi* doctor and star witness for the state, W. S. Taylor, testified on his direct examination by the prosecuting attorney to a conversation he had with the defend-

ant, as follows: "I saw him afterwards at my office on Locust street. He wanted to know why in hell I didn't come when he left the call for me, and said he had given too much knockout drops; that he didn't intend to; and that it was a mistake." This testimony thus introduced by the state would, if believed by the jury, not only justify, but require them to return a verdict of murder in the second degree or of manslaughter only. And this, because if the poison was administered without intent to kill, or by mistake, either of such facts would negative the "wilful, deliberate and premeditated killing." Surely it cannot be necessary to further discuss so plain a proposition. The following and many other cases decide that where death is caused by poison the jury may properly find the accused guilty of murder in the second degree:

State vs. Gray, 19 Nevada, 212.
State vs. Lindsey, 19 Nevada, 47.
Johnson vs. State, 17 Ala., 618.
Levison vs. State, 54 Ala., 520.
Robbins vs. State, 8 Ohio St., 131.

IV.

Our Iowa statute defining the crime of murder and classifying it in two degrees, expressly requires the jury to inquire and by its verdict ascertain and determine the degree. This statute is imperative and inhibits the courts from interfering.

In this case the court, after stating the issues as made by the indictments and the pleas by the defendant, stated the substance of part of the statute defining murder and then instructed the jury as follows:

"When murder, that is, killing a human being with malice

aforethought, is perpetrated by means of poison, the law implies because of the nature of the ct, that it was done intentionally, wilfully, deliberately, premeditatedly and with malice aforethought, and therefore declares it to be murder in the first degree. Such being the law, you are not called upon to consider as to murder in the second degree or manslaughter. Your verdict *must* be guilty of murder in the first degree, or not guilty."

As we have seen in the discussion and authorities thus far, in every case under this statute, there are certain questions as to the mental condition of the accused. In every case the jury must determine whether the poison, if you please, was administered by mistake or whether it was in good faith given and an error respecting the dose, which being excessive, produced death, as also the question of wilful, deliberate and premeditated act. Hence, in no case would it be practicable for the court to give the instruction which we are now considering. It is an imperative instruction and direction to the jury in respect of the degree and denies to the plaintiff in error, the defendant in the court below, the right of trial by jury. Respecting this there is no room for controversy. The language of the instruction is "that your verdict *must* be guilty of murder in the first degree, or not guilty. The jury were allowed no discretion, which is given to every jury at the common law, and which the statute of Iowa actually demands shall be given in determining the degree of the offense.

We believe that the State of Pennsylvania was the very first state to enact the division of the crime of murder into degrees. The language of the Pennsylvania statute is precisely in very words, the statute of Iowa, which we have hereinbefore set forth. The statute of Pennsylvania was enacted in 1794. The statute of Iowa was enacted in 1851.

In Commonwealth vs. Keeper of Prison, 2 Ashmead (Pa.) 227, which was decided in 1838, this question was adjudicated. The case arose upon proceedings by habeas corpus for bail. If the crime was of the first degree the petitioners were not entitled to bail. If of the second degree, they were. Thus the question was directly and clearly presented. We quote from the opinion as folows (234):

"A well settled series of decisions flowing in one current since the act of 1794 by which murder was discriminated and divided into degrees, have established that, to constitute the capital offense the homicide must not only have been malicious, but that it must have been perpetrated with an intent to take life, except where the murder was committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, mayhem or burglary. * * * (235) Murder by 'poison or lying in wait' are given as instances of wilful, deliberate and premeditated killing. Not as cases which, under all conceivable circumstances, are to be regarded as such. When, however, a malicious homicide accompanies the perpetration or attempt to perpetrate an arson, rape, robbery or burglary, the common law is left to its full operation and the incendiary, ravisher, robber or burglar, if he takes life in the prosecution of his crime, is answerable capitally for its consequences whether he did or did not intend to kill. Suppose, for instance, a quack should administer a poisonous drug, not with intent to kill, but under the honest but mistaken idea of relieving his patient, but where from the magnitude of the dose, or the peculiar condition or habits of the patient, death ensues; here would be a case of killing by poison, but not one of murder by poison, for who could regard such a case as one of wilful, deliberate and premeditated killing."

The charge in that case was causing death by poison, but the evidence showed that it was caused by the administration of a poisonous drug to the female being treated for the purpose of abortion and where it was manifest, most unmistakably, that the doctor did not administer it for the purpose of killing, but

for the purpose of causing an abortion and possibly the death of another, but surely not of killing the person to whom the poison was administered. Such a case illustrates very forcibly the error in the instruction we are discussing and in the instruction which assumes that the mere administering of poison whereby killing is caused, raises not only the presumption, but, in the language of the Court, "the law implies because of the nature of the act that it was done intentionally, wilfully, deliberately, premeditatedly and with malice aforethought." These presumptions do not any one of them arise and cannot arise, we most respectfully submit, from the single act of administering a poison. The intent must always be a question of fact to be found by the jury.

In the state of Michigan a statute, exactly a copy of the Iowa and Pennsylvania statute, was enacted in 1846. There under arose the case of The People vs. Potter, 5 Mich., 1. The head note of the case states the point decided, both authoritatively accurately, as follows:

"Facts which constitute murder at the common law do not necessarily make the act of murder of the first degree under the statute. The statute does not change the common law definition of murder, but divides it into degrees; and where it is sought to have the jury convict of murder of the first degree, the burden of proof is upon the prosecution to show such facts in addition to the act of killing as make such act murder of the first degree."

In Ohio the statute is, in substance, the same as the Pennsylvania and Iowa, but differs in its collocation of the subject matters embraced in the portion defining murder in the first degree, and was enacted in 1815. The question involved in this case came to the supreme court of Ohio in Robbins vs. The State, 8 Ohio, 131. We quote from the opinion in that case, page 195:

"But the legal proposition laid down by the court to the jury left them no discretion whatever. They could not find the defendant guilty otherwise than as he stood charged in the indictment; and the court instructed them that if they found him guilty as he stood charged, they were bound to find him guilty of murder in the first degree; for the reason that in certain cases murder may be of different degrees. This was saying to the jury, in effect, that in this case, being a case of homicide by means of poison, the crime was not graduated, but must necessarily rise to the grade of murder in the first degree. This was, therefore, ascertaining the degree of the offense by a legal proposition determined by the court, instead of leaving it to the jury to ascertain the degree of the offense from the evidence given on the trial. Murder by means of poison cannot be made an exception. The language of the statute is, *'that in all trials for murder'* the jury shall ascertain the degree of the crime. It is undeniable that manslaughter may be committed by means of poison." See, also, Dick vs. State, 3 Ohio St., 89.

There are numerous Pennsylvania cases which are entirely in accord with the case quoted from above in 2 Ashmead, and there are no contrary decisions anywhere, so far as we have been able to find. A fair exemplar is the case of Lane vs. The Commonwealth, 59 Penn. St., 371. We quote from the opinion 372-3, as follows:

"The question now for our consideration is whether the court below erred in the portions of the charge to the jury excepted to and assigned for error, which are as follows: 'First—The life or death of this man is in your hands; there is no middle course; he *must* be convicted of murder of the first degree, or acquitted of everything. If your verdict is guilty of murder, you *must* state of the first degree. If not guilty you say so, and no more.

"The objection to these portions of the charge is that they were peremptory, and took from the jury their exclusive right and duty to find the degree, in case of a conviction of murder."

* * * (The statute is then quoted, which is the same as the Iowa statute hereinbefore stated.) "It must be admitted,

we think, that the act makes no distinction as to the requirement to find the degree of murder, between any of the modes by which it may be perpetrated, as defined in the statute. In all alike the requirement applies without any exception. Even in case of a confession of the crime and submission to the court, no matter by what means it may have been perpetrated, whether by poison, lying in wait, or in an attempt to commit either of the enumerated crimes, in which intention to kill is not a material inquiry, the court must before sentencing, examine witnesses and determine the degree. The law is imperative and it is indispensable in the trial of a homicide, that the degree of the crime be ascertained and appear on the record. This is to be done by the jury where there is a trial, and by the court where there is a sentence on a confession. It is as essential an element of the verdict as any other fact to be found by it. It is this which ascertains and fixes the penalty to be attached to the crime, and hence it must appear by the record." The opinion refers to several other Pennsylvania cases. See, also, Johnson vs. Ainsworth, 25 Pa. St., 387.

In the case of the People vs. Williams, 73 Cal., 531, the statute of California being in substance the same as in Pennsylvania and Iowa, an instruction was given that omitted the element of deliberation and premeditation. In the opinion the court uses this language (532): "But whatever we may think of the evidence, he is entitled to his 'due process' and to a fair trial according to the rules of law. Until found guilty upon such a trial, he stands clothed with the presumption of innocence. With this most important element omitted the defendant has not had his day in court—has not been tried and convicted by a jury of the crime with which he was charged and of which he has been adjudged guilty."

In State vs. Lindsley, 19 Nev., 47 (5 Pac. Rep. 822), where a statute substantially like the Iowa statute exists, the court says in the opinion (51): "A judge should always inform the jury of the degree which the law attaches to murder by whatever means the crime may have been committed; but in every case it is the province of the jury, if

the prisoner is found guilty, to determine and fix the degree by their verdict, and the courts cannot deprive the jury of their right to fix the degree by imperatively instructing them in a case where the crime was committed by administering poison (or in any other case) that if they find the prisoner guilty they must find him guilty of murder in the first degree."

In Brown vs. The State, 109 Ala., 70, (20 So. Rep., 103), the court in construing a statute substantially like the Pennsylvania and Iowa statute, in the course of its opinion, used this language: (72) "The essential constituents of murder in the first degree, when, as in the present case, the homicide is not perpetrated under any of the particular circumstances or conditions enumerated in the statute, are that the taking of life must have been wilful, deliberate, malicious and premeditated. These must concur and co-exist, or, whatever other offense may be committed, this offense of statutory creation is not committed. There is no possible state of facts from which the law presumes their concurrence, and co-existence; and their concurrence and co-existence is not a fact to which a witness or any number of witnesses can testify. It is matter of inference from all the facts and circumstances of the particular case. As the law makes no presumption in reference to it, the inference cannot be drawn and announced by the judge; the jury alone can determine inferences to be drawn from the evidence. * * *

(89) Whenever human life is intentionally taken without the authority of law, malice is presumed or implied, unless the evidence, *res gestae* repels the presumption or implication; more than presumed or implied malice is essential to constitute murder in the first degree; there must be conjoined with malice, wilfullness, deliberation and premeditation, or the crime must have been perpetrated under some one of the categories enumerated in the statute. Whether there is a concurrence and co-existence of these essential constituents is of necessity dependent upon the facts and circumstances of the particular case; and, as we have said, the determination of the fact lies within the exclusive province of the jury under proper instructions from the court. When no more appears, and the instruction cannot be construed as predicating more than an unlawful and intentional

killing without excuse or mitigation, the homicide cannot be deemed more than murder in the second degree."

See also

Fields vs. State, 52 Ala., 348.

Thomas vs. State, 5th Howard (Miss.) 20 (i. e.) 32

State vs. Grant, 7 Oregon, 414.

Dukes vs. The State, 14 Florida, 499.

Adams vs. The State, 29 Ohio, 412.

Sanders vs. The State, 18 Tex. App., 372.

State vs. Starr, 38 Mo., 270.

Mitchell vs. The State, 13 Tenn. (5 Yerg.), 340.

Levison vs. The State, 54 Ala., 520.

The supreme court of Iowa, when the question first came before it in 1858, seven years after the enactment of the statute which we have hereinbefore copied, held in accordance with the authorities we have before quoted from and cited. In the case of the State vs. Moran, 7 Iowa, 236, the question was brought directly before the supreme court. The verdict of the jury was, "We, the jury, find the defendant guilty as charged in the indictment." A motion was made to set aside the verdict and for a new trial for the reason that the verdict "does not say, as the law requires, whether the defendant was guilty of murder in the first or second degree." This motion was overruled, and on appeal to the supreme court that court, in construing the statute as hereinbefore set out, used the following language (239):

"The crime of murder as known and recognized at common law, is briefly defined by section 2568 of the code. The two next sections were designed to separate its degrees of guilt. Upon the trial of a prisoner charged with this crime, it is made the imperative duty of the jury if they find him guilty, to inquire, and by their verdict ascertain whether he is guilty of murder of the first degree or second degree. They are required, by law, to *ascertain* the degree of his guilt. When they report

he is guilty as charged in the indictment, we cannot regard that they have ascertained and reported the degree of his guilt, within the contemplation of the law. If the verdict, in this case, would be good, then why not good, if simply 'guilty'? Does it amount to anything more in legal effect? It seems to us not, and yet such a verdict would not, certainly, be so far a compliance with the requirement of the code, as to justify a conviction for murder in the first degree. If it would, then the object and purpose of the statute would be defeated. The statute is penal, and should receive a strict construction. Prior to its enactment all murder in this state was punished with death. As, however, in the language of the Pennsylvania statute of 1794, that it was deemed unjust to involve offenses differing so greatly in degree, in the same punishment—the two degrees were recognized, and an additional guarantee in favor of human life provided, in requiring that the jury should inquire, investigate, direct their attention to the degree of guilt, and ascertain the same by their verdict. The construction given accords, therefore, as we think, with the intention and policy of the law, as well as its plain language."

The principle involved in the case just quoted from has often been recognized by the supreme court of Iowa later; among them we refer to the State vs. Adams, 78 Iowa, 292, where the court in closing a discussion upon the instructions uses this language: (295) "At least the degree of the crime, if any, was not for the court to determine," and the judgment of conviction rendered by the court below was reversed by the supreme court. Another case to which we will refer is the State vs. Wood, 112 Iowa, 411. In the course of the discussion of the case, which was grounded solely on circumstantial evidence, the court uses this language: (415) "Inasmuch as every one, in the absence of the contrary showing, is presumed to intend the natural consequences flowing from his own acts, we think the guilt of the defendant of any particular degree of murder or of manslaughter is for the jury, and not for the court to de-

termine." These two cited cases only recognize the specific language of the statute as applicable to those cases. Other later cases in Iowa are more or less in accord with the instruction given in the case at bar. In respect of these later Iowa cases we need only say that an error, though oft-repeated and long persisted in, cannot establish its verity or correctness.

It is a rule of law and of interpretation as we understand it that where a state enacts a statute transcribing it from statutes of another state, that by such enactment the legislature in effect adopts the construction which the courts of the state have placed upon such statute. Our legislature in 1851 adopted in very words the statute of Pennsylvania of 1794, which had been construed by the courts of Pennsylvania in the case reported in 2 Ashmead, 227, and other cases, and thereby our legislature adopted the construction of the courts of Pennsylvania as a part of the statute, and, indeed, our own court in the case referred to in 7 Iowa did adopt that interpretation. It therefore becomes conclusive upon the courts of Iowa.

In concluding the discussion upon this third proposition of our argument, we beg leave to quote from a text book, Vol. 1, McClain's Criminal Law, Section 359, a standard and well approved work on that subject, which was prepared by Judge McClain of the Iowa supreme court, who is also the author of the opinion of that court in the case at bar. We quote:

"The question whether the killing was deliberate and premeditated is for the jury, and it is erroneous to charge that certain facts will show deliberation and premeditation; or that there are no circumstances in the case to reduce the offense below that of murder in the first degree. Circumstances indicating premeditation and deliberation are to be construed by the jury only as evidence and not as conclusive in law. Even where the statute provides that murder perpetrated by means of pois-

on, or by any other kind of wilful, deliberate and premeditated killing, etc., shall be murder in the first degree, the jury may still find a verdict for the second degree under a charge of murder by poison, the statute especially prescribing that the degree shall be determined by the jury."

This doctrine of the text book prepared by Judge McClain, it seems to the writer of this argument, is quite at variance with the language of the opinion, and we are seeking to establish the doctrine as set forth in the text which we have quoted; and we think that the authorities hereinbefore quoted from and cited quite well establish the doctrine of the text and completely overturn the doctrine and language of the opinion.

This court has determined for itself substantially the doctrine for which we contend. The statute of Utah respecting murder in the first degree embodies substantially, though in different language, the same material facts to be shown as do the statutes of Pennsylvania, Iowa and many other states.

In Hopt vs. The People of Utah, 110 U. S. Rep., 574, this court maintains fully, as we submit, the doctrine for which we contend in the case at bar. In the opinion in that case, it is said (582): "In view of the statutory provisions to which the attention of the jury was called, it is clear that the observation by the court that "an atrocious and dasardly murder has been committed by some person," was naturally regarded by them as an instruction that the offense by whomsoever committed, was murder in the first degree; whereas, it was for the jury having been informed what was murder by the laws of Utah, to say whether the facts made a case of murder in the first degree, or murder in the second degree."

In the same case, on a previous appeal to this court (104 U. S. 631) it was held that under such a statute defining murder in the first degree, it was necessary to prove the act to have been wilful, deliberate and premeditated; this one case on the two appeals not only recognized but established the doctrine entire for which we contend in the case at bar.

V.

There was error in giving instruction number four. The court only requires the jury to find the administration of the poison which caused the death and that it was administered with a bad motive and intent in order to make it murder in the first degree, even though there was no intent to kill. The instruction is as follows:

"If upon inquiry as last directed, you find that the death of Mabel Schofield was caused by means of poison, you will then inquire and determine whether the poison was unlawfully administered to her. When a person with good intentions, and with no wrongful purpose, or innocently by mistake, administers poison to another, it is not murder, though death ensues, as in such cases there is an absence of criminal intent, and of malice aforethought. But, where one person administers poison to another, such as to kill, with a bad motive and intent, if death ensues from the administration of such poison it is murder in the first degree, and this is true, although there was no specific intent to kill."

Even at the common law an unlawful act done with a bad motive and intent resulting in the death of another was not murder. The unlawfulness must have been felonious and the bad motive and intent must have been not simply bad, but with malice aforethought. This instruction under the common law where there were no degrees in murder would be erroneous, as we submit. Even malice aforethought is not required by the instruction to make the offense murder in the first degree. Under our statute, which requires for the first degree wilful, deliberate and premeditated purpose and intent in order to constitute murder in the first degree, it must be, beyond question, erroneous to authorize a jury to find a verdict of guilty in the first

degree simply upon bad motive and intent in administering the poison. We submit upon the authorities hereinbefore quoted from and cited that there can be no question respecting the error embodied in this instruction.

VI.

Instruction number five as given by the court was erroneous in that it did not require either malice aforethought or wilful, deliberate or premeditated act in order to constitute it murder in he first degree.

In the first part of Instruction Number Five the court instructs the jury as to the measure of evidence required to convict, the presumption of innocence, the burden of proof, and the provisions of the section of the code, as to reasonable doubt, and then follows the essential part of the instruction, towit:

"If upon inquiring as directed you have a reasonable doubt, as just explained, as to whether Mabel Schofield's death was caused by poison, or if so caused, whether the poison was unlawfully administered, whether the defendant administered it or was concerned in administering it, your verdict should be not guilty; but if you find each of these propositions proven beyond a reasonable doubt, your verdict should be guilty of murder in the first degree."

It is not difficult to analyze or interpret this instruction. It requires simply that the jury should find that the death was caused by poison unlawfully administered and that the defendant was concerned in administering it. Just that and no more. This instruction, like our criticism of the fourth, does not require even malice aforethought, which is necessary to constitute

murder at the common law. While murder in the first degree under the statute cannot be consummated except in connection with the felonies named in the statute itself without a wilful, deliberate and premeditated purpose to kill. None of these elements are required by this instruction. The theory of the court being, most evidently, that the administration of poison unlawfully, causing death, was not only evidence of the homicide, but became evidence conclusive of the wilful, deliberate and premeditated purpose to take life. Or, in other words, as imperatively expressed in the second instruction, which we have heretofore criticized, that if the killing was perpetrated by means of poison that the law implies the purpose, motive, intent and supplies everything else requisite to make the offense murder in the first degree. This is directly in conflict with all of the authorities in respect of the intention or purpose of one accused of crime, which must always be found by the jury, as a fact, and are not deduced ever by presumption of law. In determining the fact respecting the intent and purpose, the jury, of course, have the right to take into consideration the means used and the method pursued to accomplish the death. But it is from these facts, as well as the other testimony in the case, that the jury will ascertain and find as a fact the intent and purpose of the act.

VII.

Instruction number six given by the court was erroneous, because it limits the facts necessary to be found by the jury in order to convict the defendant of murder in the first degree, to the two facts, towit: The unlawful administration of the poison administered with bad intention causing death. The following is the instruction:

"If you have found that the death of Mabel Schofield was caused by poison unlawfully administered to her, you will then inquire whether the defendant, Thomas, caused Mabel Schofield to take the poison, or was concerned in causing it to be done.

If you find that the defendant, Charles Thomas, unlawfully with bad intention caused poison to be taken by Mabel Schofield which caused the death of Mabel Schofield, you should find the defendant, Thomas, guilty of murder in the first degree, but if you fail to so find, your verdict should be not guilty."

There is not much, if any, material difference between the three instructions, four, five and six. Possibly each, however, in succession required the jury to find the defendant guilty of murder in the first degree with the establishment of less facts than its immdiate predecessor. In this last, the sixth instruction, it only requires that the jury shall find that the defendant, Charles Thomas, unlawfully with bad intention caused poison to be taken by Mabel Schofield, which caused her death. Surely this instruction falls so far short of the requirements of the Iowa statute in respect of the acts necessary to be proven in order to convict one of murder in the first degree that it can hardly require discussion. The authorities we have cited under division four of this argument are abundant to negative the correctness of this instruction.

VIII.

The Federal questions arise upon the decision of the trial court, which was affirmed by the supreme court of Iowa, whereby the plaintiff in error was denied the right of trial by jury, contrary to the Fourteenth Amendment to the United States Constitution, towit:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The guaranty of "Due process of law" embraces a guaranty of the right of trial by jury, including the right to have the jury find every fact material or necessary to show the guilt and its degree of the crime charged against the accused. The crime charged against the plaintiff in error by the indictment was murder in the first degree, the penalty for which was more severe than for murder in the second degree or manslaughter, both of which were also included. The right to have the jury ascertain and determine the degree of the crime of which the plaintiff in error was guilty, if at all, is clear under the common law and the statute alike. The question of this right arose in the trial court, in connection with the instructions to the jury, and the trial court denied the right. On appeal to the supreme court of Iowa, the same questions were presented and argued and the ruling and judgment of the trial court were affirmed.

As relating to federal questions and when involved, see

Crowell vs. Randall, 10 Peters, P. 368.

Armstrong vs. Athens Co., 16 Peters, 281.

Murray vs. Charleston, 96 U. S. Reps., 750.

Ruby vs. Colehour, 13 Sup. Ct. Rep., 47.

American Sugar Refining Co. vs. State of Louisiana et al, 21 Sup. Ct. Rep., 43. .. ..

Columbia Water Power Co. vs. Columbia Electric Street Ry., L. & P. Co., 19 Sup. Ct. Rep. 252.

It is contended on the part of plaintiff in error that the Iowa statute defining murder in the first degree has been ren-

dered discriminatary and hence unconstitutional by reason of the interpretation and decisions as rendered thereon by the supreme court of Iowa; that by virtue of such interpretation and procedure, as based thereon, the plaintiff in error has been deprived of a fair and impartial hearing, due process of law and the equal protection of the laws as guaranteed by the constitution of the United States and the constitution of the state of Iowa.

In conclusion, we submit that Charles Thomas, plaintiff in error, was practically denied a trial by jury, when the trial court, by its mandatory instruction required the jury to find him guilty of murder in the first degree, if they found him guilty at all. This peremptory fixing of the degree of guilt by the court was violative of the 14th Amendment, which guarantees to every person the right to due process of law. This error is both conclusive of the jurisdiction of this court and of the error of the supreme court of Iowa, which affirmed the action of the trial court. Further errors are shown by the instructions as discussed in the foregoing argument. Respectfully submitted,

MULVANEY & MULVANEY,
Attorneys for Plaintiff in Error.

C. C. COLE, of Counsel.

Office Supreme Court, U.
FILED.
FEB 21 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

CHARLES THOMAS,
Plaintiff in Error,
vs.
THE STATE OF IOWA,
Defendant in Error.

No. 533.

CHESTER C. COLE and
MULVANEY & MULVANEY,
Of Counsel for Plaintiff in Error.

H. W. BYERS, *Attorney-General.*
CHARLES W. LYON, *Assistant Attorney-General,* and
E. B. EVANS,
Of Counsel for Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

Due, timely and legal service of the within brief and argument is hereby acknowledged with copies thereof this..... day of February, 1908.

.....

.....

Counsel for Plaintiff in Error.

STATEMENT.

The defendant, Charles Thomas, the plaintiff in error in this court, was indicted by the grand jury of Polk county, Iowa, on the 31st day of December, 1904, charged with the crime of murder in the first degree committed by the unlawful administration of poison.

Trial was had commencing on the 13th day of February, 1905, upon the issues formed by a plea of not guilty.

The jury returned a verdict on the 4th day of March, 1905, finding the defendant guilty of murder in the first degree as charged in the indictment, and determined that the defendant should be imprisoned in the penitentiary for the period of his natural life. Whereupon the court pronounced judgment and sentenced the defendant in accordance with the finding of the jury.

On the 3d day of July, 1905, the defendant perfected his appeal from the judgment of the district court to the supreme court of Iowa; the case coming on for hearing at the September, 1906, term of the supreme court. On the 21st day of November, 1906, the supreme court of Iowa handed down its opinion affirming the judgment of the lower court. Opinion is recorded in Volume 109 N. W. R. at page 900.

ARGUMENT.

I.

Does the record in this case present a federal question?

Defendant in error, the state of Iowa, contends that tne record in this case as evidenced by the writ of error certified

to this court, does not present a federal question. Before taking up the merits of the question presented, we desire to state briefly our reasons for contending that no federal question has been raised. Plaintiff in error has in his writ raised but a single question, and that is: Was the defendant by reason of certain instructions given by the trial court deprived of a right guaranteed him by the constitution and laws of the United States? The instructions complained of are Nos. 3, 4, 5, 6 and 14. See transcript of record, pages 21, 22, and 23.

The specific complaint of these instructions is that the jury are told that under the indictment and evidence in the case they should either find the defendant, Charles Thomas, guilty of murder in the first degree, or acquit him. The Iowa statutes drawn in question are as follows:

Section 4727. Whoever kills any human being with malice aforethought either express or implied, is guilty of murder.

Section 4728. All murder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, is murder in the first degree, and shall be punished with death, or imprisonment for life at hard labor in the penitentiary, as determined by the jury, or by the court if the defendant pleads guilty.

Section 4729. Whoever commits murder otherwise than as set forth in the preceding section is guilty of murder of

the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term of not less than ten years.

Code of Iowa 1897, title 24, chapter 22.

Section 4727 defines the crime of murder. In section 4728 the legislature of Iowa has said that murder committed in a certain way, that is by means of poison, etc., is murder in the first degree. Section 4729 states that murder committed otherwise than designated in section 4728 is murder in the second degree.

There was no evidence in the trial of the case, nor is the question raised here that Mabel Scofield met her death by means other than poison, and the legislature of Iowa saw fit in section 4728 of the code to say that murder committed by means of poison is murder in the first degree. There was no evidence in the trial of the case, nor no contention upon the part of the defendant, Thomas, that the poison had been lawfully administered. The instructions given were warranted and authorized by section 4728 of the code.

The whole question then is bottomed upon the proposition as to whether or not the state has a right by and through its legislature to say what shall constitute murder in the first degree.

That the state has such right, we think, cannot be seriously questioned.

By the 14th amendment to the constitution of the United States, which is the only part of the federal constitution which

plaintiff in error has drawn in question, the powers of a state in dealing with crime within its borders are not limited except that it cannot deprive particular persons or classes of persons of equal or impartial justice under the law. Due process of law is secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right.

The plaintiff in error contends that the construction placed upon the Iowa statute defining murder in the first degree by the supreme court of Iowa, has rendered such statute discriminatory, and that by virtue of such interpretation and procedure, the plaintiff in error has been deprived of a fair and impartial hearing. Due process of the law and equal protection of the laws are guaranteed by the United States and the constitution of the state of Iowa.

Defendant in error contends that the supreme court of the United States will not review on writ of error the judgment or decree of the highest court of a state in respect to the construction of its own constitution and laws in controversy not involving any federal question, when the decision turned upon the *construction,* not the validity of a state law, and the question of validity was not raised. Neither will it inquire into the grounds and reasons upon which the supreme court of a state proceeded in its construction of the statute and constitution of that state.

In the case of *Commercial Bank vs. Buckingham,* 5 How., 317, this court declared that the power delegated to the supreme court is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary.

See also *Lloyd vs. Matthews,* 155 U. S., 226 at 227;
McBride vs. Hoey, 11 Pet., 167;
Watts vs. Washington, 91 U. S., 586.

We contend that the instructions given were warranted by section 4728 of the Code, which section defines murder in the first degree. That being true, whatever objection plaintiff in error makes against the instructions would necessarily apply as counsel suggest to the statute in question. This statute was in effect held by the opinion of the supreme court of Iowa in the case at bar, not to have been in contravention of the provisions of the state constitution.

Notwithstanding the provisions of article 5 of the amendments to the constitution of the United States which provide: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * *" and the provisions of section 1, article 14, which are "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws," this court has held in the case of *McNulty vs. California,* 149 U. S., 645, affirming the case of *Hurtado vs. California,* 110 U. S., 516, that the

words "due process of law" in the 14th amendment do not necessarily require an indictment of a grand jury in a prosecution by a state for murder, whose constitution authorizes such prosecution by information.

In the case of *Wilson vs. North Carolina,* 169 U. S., 586, at 592, it is said: "Authorities are not required to support the general proposition that in the construction of the constitution and laws of the state this court follows the construction given to these instruments by the highest court of the state."

Again in the same opinion it is said (593), quoting from *Allen vs. Georgia,* 166 U. S., 138 at 140:

> "To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the supreme court of a state had acted in consonance with the constitutional laws of a state and its own procedure it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

To our mind this clearly gives the state the right to deal with crime within its borders as it sees fit so long as it does not deprive *particular* persons or classes of persons of equal or impartial justice under the law. When the highest court of a state holds that the judgment of one of its inferior courts imposing punishment in a criminal case is valid and binding to the extent to which the law of the state authorizes the punishment, no principle of federal law is involved. *In re Graham,* 138 U. S., 461 at 464.

In order to give the supreme court of the United States jurisdiction of writ of error to a state court under the provisions (Revised Statutes of the U. S., sec. 709) it must appear affirmatively, not only that a federal question was presented for decision by a state court, but that its decision was necessary to the determination of the case, and that it was decided adversely to the party claiming a right under the federal laws or constitution, or that the judgment as rendered could not have been given without deciding it.

In support of this contention we desire to call this court's attention to a few of the cases bearing directly upon this proposition.

In the case of *California Powder Works vs. Davis,* 151 U. S. 393, in the opinion written by Mr. Chief Justice Fuller, it is said:

> "It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a

federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented. *Eustis vs. Bolles*, 150 U. S., 361. It is equally well settled that where our jurisdiction depends upon the denial by a state court of a title, right, privilege, or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. *Schuyler Bank vs. Bollong*, 150 U. S., 85, 88. We cannot find that the title or right referred to in argument was specially set up or claimed prior to its assertion in the petition for the writ of error, which forms no part of the record of the court below. *Clark vs. Pennsylvania*, 128 U. S., 395."

Again in the case of *Morrison vs. Watson*, 154 U. S., 111 at 115, we find the following in an opinion written by Mr. Justice Gray:

"In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a state, on the ground that it decided against a title, right, privilege, or immunity claimed under the constitution or a treaty or statute of the United states, such title, right, privilege, or immunity must have been 'specially set up or claimed' at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law and practice of the state, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the state; it cannot be asserted in this court. Rev. Stat., 709; *Spies vs. Illinois*, 123 U. S., 131, 181; *Brooks vs. Missouri*, 124 U. S., 394; *Chappell vs. Bradshaw*, 128 U. S., 132, 134; *Brown vs. Massachusetts*, 144 U. S., 573; *Schuyler National Bank vs. Bollong*, 150 U. S., 85; *Miller vs. Texas*, 153 U. S., 535."

See also *Harrison vs. Morton*, 171 U. S., 38 at 47.

In the case of *Maxwell vs. Newbold*, 59 U. S., 511, it is said that in some of the earlier cases (referring to *Miller vs. Nicholls*, 4 Wheaton, 311), it was held to be sufficient to give jurisdiction that an act of congress was applicable to the case, but experience shows that this rule is not a safe one for the reason that if the supreme court reversed the judgment upon the assumption that a federal right had been denied, the reversal would sometimes be for a supposed error which the state court had not committed and upon a point

which the state court had not decided and as this want of harmony in the decisions of the court was likely to mislead counsel in the prosecution of writs of error to state courts, the supreme court in *Crowell vs. Randell,* 10 Pet., 368, reviewed and commented on all preceding cases bearing upon the proposition and announced the rule which has been uniformly adhered to.

In the case at bar it is nowhere set out in the bill of exceptions that the charge of the court was against and in conflict with the constitution or laws of the United States, and even though such allegation did appear in the record in this case, it would not be sufficient for the reason that such an allegation would be too indefinite to determine what clause in the constitution, or what law of congress may have been relied upon.

As has been above stated the attention of the court must have been called to the particular clause or clauses of the constitution upon which the plaintiff in error, Charles Thomas, relied and the right he claimed under it, and the question thus presented must have been decided against him.

II.

Did the court err in insructing the jury that if they found that Mabel Scofield came to her death by means of poison administered to her unlawfully, with a bad motive and intent, and if they found that the defendant, Charles Thomas, so administered the poison to her that their verdict should be guilty of murder in the first degree?

The instructions material to the question herein presented are set out in the bill of exceptions filed herein and are as follows:

2.

I next call your attention to the provisions of the code upon which this charge is based.

Section 4727, defines murder as follows: "Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder."

You observe that to be murder must be with malice aforethought; it is this that distinguishes murder from excusable or justifiable killing of a human being.

Section 4728 so far as applicable to this case is as follows: "All murder that is perpetrated by means of poison is murder in the first degree, and shall be punished with death, or imprisonment for life, at hard labor in the penitentiary, as determined by the jury."

When murder, that is, killing a human being with malice aforethought, is perpetrated by means of poison, the law implies because of the nature of the act, that it was done intentionally, willfully, deliberately, premeditatedly and with malice aforethought and therefore declares it to be murder in the first degree.

Such being the law you are not called upon to consider as to murder in the second degree or manslaughter. Your verdict must be guilty of murder in the first degree or not guilty.

3.

With these definitions and provisions of the law in mind, you will now inquire and determine whether murder as defined was committed as alleged in the indictment.

It is conceded that Mabel Scofield died in this county, in the month of October, 1899.

The first allegation in the charge for you to decide is whether Mabel Scofield came to her death by means of poison, and in doing so you will take into consideration the evidence as to her physical condition, the circumstances preceding her death, the condition of the body as to the presence or absence of poison, evidence if any of death by drowning, and all evidence fairly tending to show whether poison was the cause of her death.

If, upon thus inquiring, you fail to find beyond a reasonable doubt as hereafter explained, that the death was caused by poison, you need not inquire further but return your verdict of not guilty.

4.

If upon inquiry as last directed, you find that the death of Mabel Scofield was caused by means of poison, you will then inquire and determine whether the poison was unlawfully administered to her. When a person with good intentions, and with no wrongful purpose, or innocently by mistake, administers poison to another, it is not murder, though death ensues, as in such cases there is an absence of criminal intent, and of malice aforethought. But, where

one person administers poison to another, such as to kill, with a bad motive and intent, if death ensues from the administration of such poison, it is murder in the first degree, and this is true, although there was no specific intent to kill,

5.

As you are to decide the material issues already pointed out upon the evidence, I next instruct you as to the measure of evidence required to convict, and the rules by which you are to determine the credibility of the witnesses, and the weight to be given to their testimony.

As to the measure of evidence required to convict, I first instruct you, that the defendant Thomas is presumed to be innocent of this charge, and that the burden is upon the state to overcome this presumption, and to prove each of said material allegations of the charge beyond a reasonable doubt.

Section 5376 of the code provides: "Where there is a reasonable doubt of the defendant being proven to be guilty he is entitled to an acquittal." No mere weight of evidence is sufficient unless it excludes all reasonable doubt as to guilt. The proof of guilt must be inconsistent with any other rational supposition; the doubt that entitles to an acquittal must be reasonable, not unreasonable, real, not captious or imaginary, not forced or artificial, but must be a doubt which without being sought after, naturally and fairly arises in the mind upon consideration of all the evidence in the case. The proof is sufficient if it establishes guilt to a moral certainty; such a certainty as fully and fairly convinces the understanding of the jurors.

If upon inquiring as directed you have a reasonable doubt as just explained as to whether Mabel Scofield's death was caused by poison, or if so caused, whether the poison was unlawfully administered, whether the defendant administered it or was concerned in administering it, your verdict should be not guilty; but if you find each of these propositions proven beyond a reasonable doubt, your verdict should be guilty of murder in the first degree.

6.

If you have found that the death of Mabel Scofield was caused by poison unlawfully administered to her you will then inquire whether the defendant, Thomas, caused Mabel Scofield to take the poison or was concerned in causing it to be done.

If you find that the defendant, Charles Thomas, unlawfully, with bad intention, caused poison to be taken by Mabel Scofield which caused the death of said Mabel Scofield, you should find the defendant, Thomas, guilty of murder in the first degree, but if you fail to so find your verdict should be not guilty.

14.

You are to try and determine this case according to the evidence produced and submitted to you in open court, on this trial, and the law has given you in charge by the court in these instructions, and upon nothing else.

You are the sole judges of the facts in the case, and the court instructs you as to the law. The court has not, how-

ever, attempted nor intended to embody in any one instruction all of the law applicable to the case. You are to consider and construe all of the instructions together, and apply them as a whole to the evidence in the case.

With reference to the degree of the crime committed, the language of the court as found in the 6th instruction states the law as contained in all the instructions given by the court, and of which complaint is made and is as follows:

"But if you find that the defendant, Charles Thomas, unlawfully and with bad intention caused poison to be taken by Mabel Scofield, which caused the death of said Mabel Scofield, you should find the defendant, Charles Thomas, guilty of murder in the first degree, but if you fail to so find your verdict should be not guilty."

Has the plaintiff in error, Charles Thomas, by virtue of the procedure in the trial of this case been deprived of the equal protection of the law and due process of law?

Counsel for plaintiff in error argue that the said plaintiff has been discriminated against and not granted equal protection under the law. In support of this contention they cite the case of *State of Iowa vs. McCormick,* 27 Iowa, 402. Counsel contend that the opinion in the McCormick case is out of harmony with the opinion in the case at bar and for that reason in the trial of the case at bar in the district and supreme court of Iowa, the defendant, Charles Thomas, was discriminated against, in that the same principles and rules of procedure were not applied as were applied in other cases before the same court.

With this contention we certainly cannot agree. The opinion in the McCormick case written by Chief Justice Dillon, is a sufficient refutation of counsels' contention. The indictment in the McCormick case charged that the defendant, Martin McCormick, "committed the crime of murder, in the first degree, in and upon one William James, then and there being feloniously, willfully, deliberately and premeditatedly, and of his malice aforethought, did make an assault, and that the said Martin McCormick, with a certain piece of a board or slat of a bedstead, the said Martin McCormick, in and upon the head of him, the said William James, then and there feloniously, willfully, deliberately and premeditatedly, and of his malice aforethought, did strike and bruise, giving to him, the said William James, then and there, with the piece of a board or slat aforesaid, in and upon the top and back of the head of him, the said William James, two mortal wounds, of which mortal wounds the said William James then and there instantly died. And so the jurors aforesaid, upon their oaths, do say, that the said Martin McCormick then and there, in the manner and form aforesaid, feloniously, willfully, deliberately and premeditatedly, and of his malice aforethought, did kill and murder."

The indictment was in two counts, but the second count was disregarded. To show that the case is not applicable to the case at bar and that it does not support counsels' contention, we quote from the opinion of the court page 407 as follows:

"We turn now to the first count. It will be perceived that it contains no allegation that the murder was committed in the perpetration or attempt to perpetrate any of the felonies enumerated in section 4192 (4728 of the Code of 1897) of the Revision, copied in the statement; and an instruction which the court gave to the jury at the instance of the state shows that the claim to convict for murder in the first degree was not based upon the evidence tending to establish the commission of a felony, but upon evidence tending to show that the killing was willful, deliberate and premeditated.

"It is with this kind of killing only that we have to do in the present case. To make this kind of homicide murder in the first degree, the statute (section 4192) declares that *the killing must be willful, deliberate and premeditated. There is no claim or averment that the murder was committed by poison or lying in wait,* and for the reasons before given the case is not to be considered as one having reference to the felonies mentioned in section 4192. The killing, then, to make murder in the first degree (and the kind of killing which was relied on below) is one which is willful, deliberate and premeditated."

It is apparent from reading the above that the rule applied in the McCormick case does not apply to the case at bar, for the reason as stated in the opinion in the McCormick case, it was not alleged that the murder was committed in the perpetration or attempt to perpetrate any of

the felonies enumerated in section 4728 of the code of 1897, then section 4192 of the revision.

We know of no case decided by the supreme court of Iowa, where the question of the construction of section 4728 of the code was before it involving a case similar to the one at bar, where a different ruling has been announced by the court in the case of State vs. Thomas. The supreme court of Iowa has invariably held that the administration of poison unlawfully with a bad motive or intent, under section 4728 of the code, constitutes murder in the first degree if death ensues, and it is immaterial whether or not there was specific intent to kill.

The following are a few of the cases in which this rule is announced:

State of Iowa vs. Bertock, 112 Iowa, 195;
State vs. Burns, 124 Iowa, 207;
State vs. Wells, 61 Iowa, 629;
State vs. Van Tassel, 103 Iowa, 6;
State vs. Smith, 102 Iowa, 656;
State vs. Carter, 100 Iowa, 501;
State vs. Cole, 63 Iowa, 695.

Malice is implied from the intentional administration of poison from which death ensues whether the act was done with the intent to take life or merely in the furtherance of some unlawful purpose.

The above proposition is supported by the following cases:

Johnson vs. State, 92 Ga., 36;
Siebert vs. People, 143 Ill., 511;
State vs. Baldwin, 36 Kas., 1;
State vs. Derchamps, 42 La., 567;
People vs. Stokes, 2 N. Y. Crim., 380;
Ann vs. State, 11 Hump., 159;
Rupe vs. State, 61 S. W. 929;
State vs. Dowd, 19 Conn., 387;
Commonwealth vs. Jones, 1 Leight, 598;
State vs. Wagner, 78 Mo., 644.

In view of the holdings in these cases it is apparent that the supreme court of Iowa has ample support in its ruling in the case at bar. We do not believe that it can be successfully contended that the legislature of Iowa had not the authority to enact section 4728 of the code referred to herein; and the language of the first part of said section clearly authorized the construction upon it by the supreme court of Iowa in the case at bar, to-wit: that the use of poison in causing death indicates deliberation and premeditation, and thus makes the homicide of the same degree of atrocity as though willful, deliberate and premeditated within the other portion of the statute.

With the classification of crime, or the fixing of degrees of the crime of murder by the legislature, or the construction placed upon such statutes by the courts of a state, we do not believe, for reasons stated in division 1 of this argument, this court will interfere so long as all coming within the classification of the statute are dealt with alike. The decision of the state courts as to what are the laws of the state is binding upon the courts of the United States.

Leeper vs. Texas, 139 U. S., 462 at 467;
Baldwin vs. Kansas, 129 U. S., 52 at 57;
Norton vs. Shelby County, 118 U. S., 425 at 440.

In *Leeper vs. Texas, supra*, it is said:

> "It must be regarded as settled that the fourteenth amendment to the constitution that the powers of the states in dealing with crime within their borders are not limited, except that no state can deprive particular persons or classes of persons of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state, the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Hurtado vs. California, 110 U. S., 516 at 535.

Counsel for plaintiff in error cite and rely upon the case of *Hopt vs. Utah*, 110 U. S., 574. In our judgment this case can avail nothing to plaintiff in error for two reasons:

First. It cannot be considered as in any manner determining the question of the jurisdiction of the United States supreme court in the case at bar, for the reason that at the time of the decision in the Hopt case, Utah was a territory, and the writ of error to the supreme court of the United States was governed by sections 702 and 1909 of the Revised

Statutes of the United States; under which sections it is not necessary that it appear in the record that a federal question has been raised as is required under section 709 of the Revised Statutes of the United States, where it is sought, as in the case at bar, to have a final judgment or decree in the highest court of a *state* reviewed upon a writ of error.

The supreme court of the United States bears practically the same relation to the supreme court of a territory as the supreme court of a state bears to the district courts within its jurisdiction.

Second. Under the statutes of Utah at the time of the decision in the Hopt case it was expressly provided that the trial judge "must not charge the jury in respect to matters of fact," and it does not appear anywhere in the statement or opinion of the court that the plaintiff in error, Hopt, had committed the murder in question by poison, or in the perpetration of, or attempt to perpetrate any of the felonies enumerated in the Utah statute defining murder in the first degree. Hence it was clearly improper as stated in the opinion, for the trial judge to say to the jury "that an atrocious and dastardly murder has been committed by some person is apparent" as it would have a tendency to indicate that the murder was murder in the first degree.

In the case at bar the indictment expressly charged the defendant with committing murder by means of poison, and under instruction No. 3 of the court, the jury were told that "if upon this inquiry you fail to find beyond a reasonable doubt as hereinafter explained that the death was caused by poison, you need not inquire further but return a verdict

of not guilty;" and in the 4th instruction the jury were told "if upon inquiry as last directed you find that the death of Mabel Scofield was caused by means of poison, you will then inquire and determine whether the poison was unlawfully administered to her;" and in the 6th instruction, the jury were told that "if you have found that the death of Mabel Scofield was caused by poison unlawfully administered to her, you will then inquire whether the defendant, Thomas, caused Mabel Scofield to take the poison or was concerned in causing it to be done."

From the above instructions it is clearly apparent that the trial court nowhere instructed the jury as to matters of fact, but left every question as to the defendant's guilt with the jury. Then if the jury should find defendant, Charles Thomas, guilty of the murder of Mabel Scofield, the court said—framing its instructions in harmony with section 4728 of the Code—in the second part of instruction 6, "If you find that the defendant, Charles Thomas, unlawfully, with bad intention caused poison to be taken by Mabel Scofield which caused the death of the said Mabel Scofield, you should find the defendant, Thomas, guilty of murder in the first degree. But if you fail to so find, your verdict should be not guilty."

We find nothing in the opinion in the case of *Hopt vs. Utah, supra*, which is necessarily in conflict with the opinion of the supreme court of Iowa in the case at bar, and there is certainly nothing in the Hopt case which would indicate that the supreme court of the United States will take cognizance of the question attempted to be raised in the case at bar at this time.

Being freely of the opinion that no federal question has been raised by plaintiff in error in his writ and that the statute in question and the interpretation which has been placed upon the same by the courts of Iowa are not discriminatory, the foregoing argument is respectfully submitted.

H. W. BYERS,
Attorney General of Iowa.

CHAS. W. LYON,
Assistant Attorney General for Defenaant in Error.

E. B. EVANS,
Of Counsel.

THOMAS *v.* STATE OF IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 533. Argued February 26, 1908.—Decided March 23, 1908.

In order to give this court jurisdiction under § 709, Rev. Stat., to review the judgment of a state court, the Federal question must be distinctly raised in the state court, and a mere claim, which amounts to no more than a vague and inferential suggestion that a right under the Constitution of the United States had been denied, is not sufficient—and so *held* as to an exception taken as to certain parts of the charge to the jury because in effect they deprived the accused of his liberty without due process of law.

It is too late to raise the Federal question for the first time in the petition for writ of error from this court or in the assignment of errors here.
Writ of error to review 105 N. W. Rep. 1130, dismissed.

THE facts are stated in the opinion.

Mr. Chester C. Cole and *Mr. John T. Mulvaney* for plaintiff in error:

Federal questions arise upon the decision of the trial court, which was affirmed by the Supreme Court of Iowa, whereby the plaintiff in error was denied the right of trial by jury, contrary to the Fourteenth Amendment to the United States Constitution.

The guaranty of "due process of law" embraces a guaranty of the right of trial by jury, including the right to have the jury find every fact material or necessary to show the guilt and its degree of the crime charged against the accused. The crime charged against the plaintiff in error by the indictment was murder in the first degree, the penalty for which was more severe than for murder in the second degree or manslaughter, both of which were also included. The right to have the jury ascertain and determine the degree of the crime of which the plaintiff in error was guilty, if at all, is clear under the common law and the statute alike. The question of this right arose in the trial court, in connection with the instructions to the jury, and the trial court denied the right. On appeal to the Supreme Court of Iowa, the same questions were presented and argued and the ruling and judgment of the trial court were affirmed. *Crowell* v. *Randall*, 10 Pet. 368; *Armstrong* v. *Athens Co.*, 16 Pet. 281; *Murray* v. *Charleston*, 96 U. S. 750; *Roby* v. *Colehour*, 146 U. S. 153; *American Sugar Refining Co.* v. *Louisiana et al.*, 179 U. S. 89; *Columbia Water Power Co.* v. *Columbia Electric Street Ry., L. & P. Co.*, 172 U. S. 475.

The Iowa statute defining murder in the first degree has been rendered discriminatory and hence unconstitutional by reason of the interpretation and decisions as rendered thereon by the Supreme Court of Iowa; by virtue of such interpretation and

procedure, as based thereon, the plaintiff in error has been deprived of a fair and impartial hearing, due process of law and the equal protection of the laws as guaranteed by the Constitution of the United States and the constitution of Iowa.

Mr. Charles W. Lyon, with whom *Mr. H. W. Byers*, Attorney General of the State of Iowa, and *Mr. E. B. Evans* were on the brief, for defendant in error:

The Supreme Court of the United States will not review on writ of error the judgment or decree of the highest court of a State in respect to the construction of its own constitution and laws in a controversy not involving any Federal question, when the decision turned upon the construction, not the validity, of a state law, and the question of validity was not raised. Neither will it inquire into the grounds and reasons upon which the Supreme Court of a State proceeded in its construction of the statute and constitution of that State. *Commercial Bank* v. *Buckingham*, 5 How. 317; *Lloyd* v. *Matthews*, 155 U. S. 226 at 227; *McBride* v. *Hoey*, 11 Pet. 167; *Watts* v. *Washington*, 91 U. S. 586.

The instructions given were warranted by § 4728 of the Code, defining murder in the first degree. That being true, whatever objection plaintiff in error makes against the instructions would necessarily apply to the statute in question. This statute was in effect held by the opinion of the Supreme Court of Iowa in the case at bar, not to have been in contravention of the provisions of the state constitution.

It is nowhere set out in the bill of exceptions that the charge of the court was against and in conflict with the Constitution or laws of the United States, and even though such allegation did appear in the record in this case, it would not be sufficient for the reason that such an allegation would be too indefinite to determine what clause in the Constitution, or what law of Congress may have been relied upon.

The attention of the court must have been called to the particular clause or clauses of the Constitution upon which plain-

tiff in error relied and the right he claimed under it, and the question thus presented must have been decided against him. *Morrison* v. *Watson*, 154 U. S. 111, 115, and cases there cited.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error by which it is sought to reëxamine a judgment of the Supreme Court of the State of Iowa. The judgment affirms the conviction of the plaintiff in error of the crime of murder in the first degree. The Code of Iowa contains the following provisions:

"(4727) Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder.

"(4728) All murder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, is murder in the first degree, and shall be punished with death, or imprisonment for life at hard labor in the penitentiary, as determined by the jury, or by the court, if the defendant pleads guilty.

"(4729) Whoever commits murder otherwise than as set forth in the preceding section is guilty of murder of the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term of not less than ten years.

"(4730) Upon the trial of an indictment for murder, the jury, if it finds the defendant guilty, must inquire, and by its verdict ascertain and determine the degree; but if the defendant is convicted upon a plea of guilty, the Court must, by the examination of witnesses, determine the degree, and in either case must enter judgment and pass sentence accordingly." Code of Iowa, 1897, Title XXIV, ch. 2, §§ 4727–30.

The count of the indictment upon which the verdict was returned alleged that the accused deliberately, premeditatively, and with malice aforethought murdered one Mabel Schofield by administering poison to her. The judge presiding at the

trial instructed the jury in substance that if they were satisfied that the accused administered poison to Mabel Schofield, unlawfully and with bad intent, and that she died from the poison thus administered, then they should find him guilty of murder in the first degree, although there was no specific intent to kill. This instruction was approved by the Supreme Court as a correct expression of the law of the State. With that aspect of the question we have nothing to do. But it is assigned as error and argued here that this instruction in effect withdrew from the jury the question of the degree of the murder, and to that extent denied the plaintiff in error a trial by jury, and therefore denied him due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Without intimating that upon this statement any Federal question is presented, we must first consider whether the question was raised in the court below in such a manner as to give us jurisdiction to consider it. There is nothing in the record to show that it was so raised. The plaintiff in error duly and seasonably excepted to the instructions complained of, but in no way was it then indicated (except as hereafter appears) that he claimed that any right under the Federal Constitution was impaired by them.

The judgment of the state Supreme Court does not contain the slightest allusion to any Federal question. The chief justice of the state Supreme Court, after the final judgment in that court, signed a bill of exceptions, which contains the following statement:

"Under the rules of practice in the Supreme Court of Iowa no assignment of errors is required or allowed; but the questions made and discussed by counsel on the hearing in the Supreme Court were such as arise upon the record, the exceptions and the motion in arrest, and for a new trial, as shown hereinbefore, and among them that the Court below erred in giving the jury each of the instructions set out in this bill of exceptions, and numbered, respectively, Two, Three, Four, Five and Six and Fourteen, and that by said instructions the said District Court

of Iowa in and for Polk County denied to this plaintiff in error the right of trial by jury, in that the Court, by said instructions, determined the degree of the crime of murder of which the jury should find the defendant guilty, if at all, whereas, by the common law and by the express statute of Iowa, the degree of the offense is a matter for the jury to determine, thereby in effect deprived the plaintiff in error of *his liberty without due process of law.*

"That upon the trial and hearing of the case in the Supreme Court of Iowa the parties, respectively, to wit, The State of Iowa, and also the defendant and appellant, Charles Thomas, by their respective counsel, submitted arguments, both in print and orally, wherein they discussed the question aforesaid, and all others arising upon the record."

The Federal question, if it can be found in the record at all, must be found in this statement. It is too late to raise it for the first time in the petition for writ of error from this court or in the assignments of error here. *Haire* v. *Rice*, 204 U. S. 291. All that appears in the statement is that exceptions were taken to certain parts of the charge to the jury, because they "in effect deprived the plaintiff in error of his liberty without due process of law"; and that the question thus raised was discussed before the Supreme Court of the State. But something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the state courts to give us the limited authority to review their judgments, which exists under the Constitution and is regulated by § 709 of the Revised Statutes. A mere claim in the court below, that there has been a denial of due process of law, does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment of the Constitution. See *Clarke* v. *McDade*, 165 U. S. 168, 172; *Miller* v. *Cornwall Railroad Company*, 168 U. S. 131, 134; *Harding* v. *Illinois*, 196 U. S. 78, 88.

Writ of error dismissed.